SUPREME COURT OF THE UNITED STATES

Nos. 524, 525, 526, 527 AND 528.—OCTOBER TERM, 1951.

Chemical Bank & Trust Co., Trustee, 524 *v.* Group of Institutional Investors. Alleghany Corporation, 525 *v.* Group of Institutional Investors. Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee, 526 *v.* Group of Institutional Investors. Farwell, et al., 527 *v.* Group of Institutional Investors. Missouri Pacific Railroad Co. 528 *v.* Group of Institutional Investors.	On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 9, 1952.]

Memorandum of MR. JUSTICE FRANKFURTER, in connection with the denial of the petitions for writs of certiorari.

Reference to the opinion in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, makes it unnecessary to indicate the reasons which preclude the Court from stating, however briefly, the grounds for denial of petitions for

certiorari. Selective notations of dissent from such denials would not correctly reflect the operation of the certiorari process. That would require notation not only of all dissents when petitions are denied. It would equally require public recording of dissents from the granting of petitions. Due regard for all these factors touching the administration of our certiorari jurisdiction has determined my unbroken practice not to note dissent from the Court's disposition of petitions for certiorari.

But it has seemed to me appropriate to indicate from time to time the issues that are involved in a litigation for which review has been sought and denied. These cases, arising out of the long drawn-out Missouri Pacific reorganization, present another such instance. The denial of these petitions for certiorari does not definitively close the door for relief to security holders who claim forfeiture of their rights. The current Interstate Commerce Commission plan for the reorganization of the Missouri Pacific system has not been consummated. It may never be consummated. If carried to the stage of confirmation by the lower courts, review may again be sought here, perhaps with the benefit of additional light. But as the matter stands, two great questions are in controversy; they are questions for which the Congress has not authorized the Interstate Commerce Commission to give final answers.

The reorganization plan sustained by the lower court involves the forfeiture of existing securities of vast proportions. The Commission's plan also eliminates existing corporations and directs financial power into new channels. These far-reaching consequences are based on the Commission's predictions of the future. One is not remotely unmindful of the relevant elements and their meaning on which judgment in such matters must be based, nor of the diffidence with which courts should sit in judgment upon the Commission's conclusions, by re-

minding that the Reorganization Act of 1933 (§ 77 of the Bankruptcy Act), 47 Stat. 1467, 1474, as amended, did subject to judicial review the determinations of the Commission and the processes which underlie them.

In three years (1940, 1944, and 1949) the Commission has proposed forfeiture plans on the basis of estimates of future earnings of the three component parts of the Missouri Pacific lines. The estimates on which the Commission based its proposals to strike down hundreds of millions of dollars of securities were the same in 1944 as in 1940. In 1949, the Commission recognized that the 1940 and 1944 estimates and forfeiture proposals were unsound, to the extent of millions of dollars.

In the eleven years since the Commission first proposed forfeiture on the basis of estimates of future earnings in this case, the actual earnings of each of the three component parts of the Missouri Pacific lines have exceeded those estimates. Two of the three have earned, in those eleven years, more than twice as much as the estimates; one earned almost fifty percent more than the estimate.

For the system as a whole, the actual earnings of the eleven post-estimate years averaged $18,000,000 per year more than the estimate on which the Commission's forfeiture plan was based. For every million dollars of underestimate of future earnings the Commission's forfeiture proposals would unjustly destroy twenty to twenty-five million dollars of securities. (For the basis of this calculation see my opinion in *Bondholders, Inc.* v. *Powell*, 342 U. S. 921.) The error indicated by the eleven years of actual earnings suggests that the Commission undervalued the property in 1940 and 1944 by $360,000,000 to $450,000,000.

In 1949, when the Commission adopted higher estimates for each of the three components of the Missouri Pacific lines and for the system as a whole, the Commission doubled the 1940 and 1944 estimate of the future

earnings of one of the three parts of the Missouri Pacific system. But the actual earnings of each of the three years since the 1949 estimate substantially exceeded even that doubled estimate. Similarly, though the Commission in 1949 substantially increased the 1940 and 1944 estimates for the other two components of the system, their actual earnings for the three ensuing years were, in the case of one of these two sections of the system, double the Commission's 1949 estimate, and, in the other, 48 percent above the 1949 estimate.

On the basis of the record of actual earnings so far available, the indicated error in the Commission's 1949 increased estimates of future annual earnings is $11,500,000; this sum, multiplied twenty to twenty-five times, in accordance with the Commission's procedures in determining the amount of forfeitures in railroad reorganizations, implies a wiping out, under the 1949 plan, of $230,000,000 to $287,500,000 of junior security holder interests.

Besides the rights which the Commission has thrice deemed valueless, it has proposed to substitute securities less valuable than what bondholders at present own. The total stated amount of Missouri Pacific system bonds, stocks, and accumulated, unpaid interest and preferred dividends, whose owners would suffer what amounts to partial or entire forfeiture, exceeds three quarters of a billion dollars.

Of these, the Missouri Pacific preferred and common stock, the two junior securities owned by the public, may be considered in connection with the estimates on which the Commission in its 1949 plan proposes to forfeit one in large part and the other entirely. The present preferred stock has a par value of $100 per share; in addition, as the Commission and the lower courts have noted, accumulated dividends (now approximately $150 per share) must be taken into account. As to each share,

having this aggregate lawful claim of $250 of participation in the railroad's property, the Commission's plan would wipe out as valueless some $217, and to allow $43 as of some value. At the present dividend rate, the Commission's finding in effect assumes that the Missouri Pacific system can earn on its present preferred stock not more than $2.15 per share. The actual earnings on this stock, in the eleven years since the Commission first began to issue its plans for the Missouri Pacific, have been $17 per share per year, or eight times the increased estimate made by the Commission in 1949. In the three years since the Commission ruled that the present preferred stock has a value of only $43 per share the company has earned more than $43 on each share.

As to the Missouri Pacific common stock: in 1940, 1944, and 1949 the Commission ruled that this stock is without value—*i. e.*, that the railroad system will in the years subsequent to the making of the estimates be unable to earn one cent on its common stock. The actual earnings on each share of this stock, in the eleven years since the the Commission first declared it valueless, have averaged $10 a year.

It might be expected that when the Commission has, at three different periods, made estimates of future earnings for each of three component portions of a railroad system, as well as for the system as a whole, and in effect for various classes of its securities some of the errors inevitable in each of the numerous estimates would be overestimates, and some would be underestimates. In this Missouri Pacific proceeding, the Commission's errors have invariably been underestimates—for the system as a whole, for each part of the system, for different classes of securities, in 1940, again in 1944, and once again in 1949.

This picture is of course drawn with a broad brush. Many other factors would enter into the whole fiscal

story of estimated earnings, actual earnings, miscalculations, foreseeable factors left out of account, unforeseeable factors, etc., etc. They would not affect the essentials here indicated—the uniformity of erroneous guessing, the invalid assumptions of such guessing, the tenuous nature of the process whereby vast interests were adversely affected, the inadequate basis for exercising the judicial scrutiny demanded by Act of Congress, etc., etc., etc. Even more than did the Seaboard situation the whole record in the Missouri Pacific reorganization proves "not the mischance of a mere guess. It calls into question the whole process of dealing with this problem. . . . the record of these railroad reorganizations at the hands of the Interstate Commerce Commission and special masters and courts have inevitably aroused deep sceptism as to expertise in this field, or, at least, as to reliance in decreeing drastic forfeitures on the basis of it. It is not to be wondered that both the Executive and the Congress have recorded dissatisfaction with the heavy incidence of forfeiture decreed by the courts, not by virtue of specific authorization, but as a matter of judicial administration."

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 524

CHEMICAL BANK & TRUST COMPANY, AS TRUSTEE UNDER THE INDENTURE, DATED AS OF DECEMBER 1, 1926, SECURING THE MISSOURI PACIFIC SECURED SERIAL BONDS,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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DORR, HAND & DAWSON,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1951

No.

CHEMICAL BANK & TRUST COMPANY, as Trustee under the Indenture, dated as of December 1, 1926, securing the Missouri Pacific Secured Serial Bonds,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Chemical Bank & Trust Company, as Trustee under the Indenture, dated as of December 1, 1926, securing the Missouri Pacific Secured Serial Bonds, respectfully prays for a writ of certiorari to the Court of Appeals for the Eighth Circuit to review a judgment, entered August 14, 1951, affirming a decision of the District Court for the Eastern District of Missouri, Eastern Judicial

Division, which approved a plan of reorganization for Missouri Pacific Railroad Company and various subsidiary companies.

Summary Statement of the Matter Involved

The Secured Serial Bonds of Missouri Pacific Railroad Company, for which petitioner is Trustee, are outstanding in the hands of the public in the principal amount of $10,425,000, with accrued interest of $8,255,297 thereon as of January 1, 1948, the effective date of the plan herein referred to, making a total publicly held claim of $18,680,297.* They are secured by 121,460 shares (approximately 81.9% of the total outstanding) of the capital stock of New Orleans, Texas and Mexico Railway Company. With fourteen wholly owned subsidiaries, the New Orleans, Texas and Mexico constitutes an important separately operated railroad system extending along the Gulf Coast from Brownsville, Texas to New Orleans, Louisiana and commonly known as the Gulf Coast Lines.

Proceedings for the reorganization of the Missouri Pacific and various affiliated companies, including the New Orleans, Texas and Mexico and its subsidiaries above referred to,** are pending before the Interstate Commerce Commission and the District Court pursuant to Section 77 of the Bankruptcy Act. The treatment to which the Secured Serial Bondholders are entitled under any plan of reorganization adopted in these proceedings depends essentially upon the value of the New Orleans, Texas and Mexico stock by which they are secured.

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* In addition, $1,715,000 principal amount have been purchased and are held by the Missouri Pacific Bankruptcy Trustee pursuant to orders of the District Court.

** Following the procedure used by the Commission and the courts below, the term "New Orleans" has been used herein to refer to the New Orleans, Texas and Mexico and its fourteen wholly owned subsidiaries above mentioned, on a consolidated basis.

In its Fourth Supplemental Report the Commission, after protracted discussion, found that "a reasonable future normal year's earnings available for payment of interest after Federal income taxes, will, so far as can be foreseen at this time, approximate * * * $4,700,000 for the New Orleans." (D. R. 28545).* It recognized (D. R. 28558, 28561) that the capitalization of its own $4,700,000 earnings figure at 4½%, the rate referred to throughout its Report, would produce a capitalization of $104,444,444 for the New Orleans considered as a separate company, and that similar computations from earnings figures for various actual years would produce substantially higher capitalizations.

The Commission stated, however, that "the maximum capitalization of the New Orleans as a separate company should have a reasonable relationship to the value of its property as evidenced by the amounts of $81,541,286 and $96,836,047 above stated" (D. R. 28561). The $81,541,286 figure, which is a typographical error for $82,206,158 (D. R. 26858), represents the Commission's determination of reproduction cost less depreciation of the major part of the New Orleans properties at 1946 period prices, plus net additions and betterments and land purchases through 1947, and an allowance for the investment of the New Orleans in International-Great Northern Adjustment Bonds. It does not include any value for other important New Orleans assets (R. 325-330, 766-773). The $96,836,047 figure represents the book value of New Orleans assets as of December 31, 1947.

In reliance on physical or rate-making valuation, accordingly, the Commission (D. R. 28561) limited the capitalization of the New Orleans considered as a separate company to $83,700,000, instead of the over $104,000,000 resulting from its own earnings figure. The Commission then,

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* "D. R." refers to the Fourth and Fifth Supplemental Reports of the Commission, as presented to the Court of Appeals pursuant to stipulation in a separate volume with its own pagination.

not actually setting up such a separate capitalization, proceeded to use this $83,700,000 figure as a maximum limitation upon the total principal amount of new securities issuable under a system reorganization in respect of the New Orleans properties, and accordingly in respect of the New Orleans, Texas and Mexico stock by which the Secured Serial Bondholders are secured.*

The Commission's Fifth Supplemental Report reiterated its determination that $4,700,000 will represent the normal year earnings of the New Orleans available for interest, and recognized again the over $104,000,000 capitalization resulting from this figure (D. R. 28655, 28656). Answering our objections to its procedure above described, the Commission (a) stated (D. R. 28657) that the prior decisions of this Court and of the Commission itself which were cited to it involved new capitalizations which proved in practice to be less than physical or book value, and (b) stressed (D. R. 28660) the quality of the new securities offered. It insisted, however, that "the capitalization should have a reasonable relationship to the physical value of its properties plus the value of investments and other stated additions thereto and to its investment as shown on its balance sheet" (D. R. 28658). Accordingly, the Commission reaffirmed as a fundamental factor in its conclusions that the total principal amount of new securities issued in respect of the New Orleans properties should not exceed $83,700,000, or $86,725,000 if the Class A stock above referred to be included.

"It is not required by the statute nor have we or the United States Supreme Court ever interpreted the

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* Except that it authorized the issuance of an additional 2½ shares of new Class A common stock in respect of each $1,000 par amount of New Orleans, Texas and Mexico stock, which may be taken as representing an additional $3,025,000 of capitalization (D. R. 28659). This allocation is specifically earmarked (D. R. 28584) as relating to the possible continuance of the current high level of New Orleans earnings, which were $6,522,486 in 1947 and $7,596,279 in 1948.

statute," said the Commission in its Fifth Supplemental Report, "as requiring that past, present and prospective earnings of a debtor be the only factor to be considered in determining its new capitalization * * *. In our opinion, a capitalization based solely on earnings without regard to the value of capitalizable assets as measured other than by earnings would not be justified." (D. R. 28657, 28658).

In approving the plan of reorganization when certified to it by the Commission, the District Court recognized (R. 925) that "Clearly, the Commission accorded great significance to the reproduction cost factor." The District Court squarely held, however, that "It is not a violation of the statute to regard reproduction cost new less depreciation as a maximum permissible capitalization" (R. 926).

The opinion of the Court of Appeals largely ignores these reiterated determinations of the Commission and the District Court, laying great stress (C. R. 27-29),* on various general statements by the Commission that it had fully compensated the Secured Serial Bondholders. The Court of Appeals refers, however, to "the elements of physical value which were taken into account by the Commission" (C. R. 27).

Jurisdictional Statement

The jurisdiction of the Court is invoked under Section 1254(1) of the United States Code, Title 28, Judiciary and Judicial Procedure, and Section 47(c) of said Code, Title 11, Bankruptcy.

The judgment of the Court below (C. R. 37-40) is dated August 14, 1951, and its opinion is reported in 191 F. (2d) 265. The opinion of the District Court is reported in 93 F. Supp. 832, and the Fourth and Fifth Supplemental Reports of the Commission, by which it approved the plan

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* "C. R." refers to the supplemental record of the proceedings in the Court of Appeals, filed in this Court.

of reorganization here involved, are reported in 275 I. C. C. 59 and 275 I. C. C. 203, respectively.

By order dated October 31, 1951, this Court extended the time for the filing of the petition herein to and including January 11, 1952. The date of filing of the present petition is January 11, 1952.

Question Presented

Whether, in a railroad reorganization proceeding under Section 77 of the Bankruptcy Act, physical value may be used as a limitation upon a larger capitalization or reorganization value which would result from the use of an earnings basis, particularly where the physical value so used does not include a value of all of the assets involved.

Reasons Relied on for the Allowance of the Writ

I

The decision below is in conflict with applicable decisions of this Court, and also with other decisions of the Court below and other Courts of Appeal on the same matter.

In *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 526 (1941), this Court stated:

> "As Mr. Justice Holmes said in *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 266, 'the commercial value of property consists in the expectation of income from it.' And see *Cleveland, C., C. & St. L. Ry. Co.* v. *Backus*, 154 U. S. 439, 445. Such criterion is the appropriate one here, since we are dealing with the issue of solvency arising in connection with reorganization plans involving productive properties. *It is plain that valuations for other purposes are not relevant to or helpful in a determination of that issue, except as they may indirectly bear on earning capacity.*" (Emphasis supplied)

In *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 523, 541 (1943), which involved a railroad reorganization under Section 77 of the Bankruptcy Act, this Court definitively held:

> "Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes. And it is our view that Congress when it passed § 77 made earning power the primary criterion. The limited extent to which § 77(e) provides that reproduction cost, original cost, and actual investment may be considered indicates that (apart from doubts concerning constitutional power to disregard them) *such other valuations were not deemed relevant under § 77 any more than under § 77B 'except as they may indirectly bear on earning capacity.' Consolidated Rock Products Co.* v. *DuBois, supra,* p. 526. In this case the Commission followed the statute. While it made earning power the primary criterion, it did not disregard the other valuations. It considered them and concluded in substance that they afforded *no reasonable basis for believing that the probable earning power of the road was greater* than what the Commission had found it to be by the use of other standards. The Commission need not do more." (Emphasis supplied)

To the same effect have been the prior decisions of the Court below (*Temmer* v. *Denver Tramway Co.*, 18 F. (2d) 226 (1927); *New York Trust Co.* v. *Continental & Commercial Trust & Sav. Bank*, 26 F. (2d) 872 (1928), certiorari denied 278 U. S. 644 (1928)); of other Courts of Appeal (e.g., *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932, 939 (C. C. A. 6th, 1942), certiorari denied, 318 U. S. 794 (1943)); and of the Commission itself in other cases (e.g., *Chicago Great Western Railroad Company Reorganization*, 247 I. C. C. 193, 195 (1941); *Chicago, Rock Island & Pacific Railway Company Reorganization*, 242 I. C. C. 298, 390-391 (1940)) and earlier in these

reorganization proceedings themselves (*Missouri Pacific Railroad Company Reorganization*, 257 I. C. C. 479, 522 (1944)).

By authoritative decisions of this Court, as well as prior holdings of the courts below and of the Commission itself, it is thus conclusively established that in both corporate and railroad reorganizations earning power is *the* criterion of reorganization value and other valuations, such as physical or rate-making value, are not relevant or helpful except as they may indirectly bear on earning capacity. Yet it is clear that this last-mentioned qualification represents the one use which the Commission did *not* make of physical value in the present case. The Commission determined in its Fourth Supplemental Report and reiterated in its Fifth Supplemental Report a normal year earning capacity for the New Orleans, recognized the earning power capitalization resulting from this determination, and then consciously and avowedly reduced this earning power capitalization in order to limit it approximately to physical value. The arbitrary limitation by this improper legal standard of the capitalization of the New Orleans, or in other words of the total principal amount of new securities issuable in respect of its properties, renders the Commission's plan unfair and inequitable to the Secured Serial Bondholders who are secured by the New Orleans, Texas and Mexico stock.

There is likewise no justification in the decisions of this Court or elsewhere for the suggestions of the Commission and the District Court that physical value, though otherwise irrelevant, may operate as a maximum limit beyond which value based upon earning power cannot be recognized. Such a rule would inevitably deprive the owners, in the present case the Secured Serial Bondholders, of a portion of the economic or commercial worth of their property, which represents its reorganization value. This is particularly true when as in the present case, contrary to

the apparent suggestion of the District Court (R. 926), it is not proposed that the Secured Serial Bondholders shall own the equity in the New Orleans properties following the reorganization. Instead, it is proposed that they shall convey these properties to a reorganized system company for a price in new securities limited below actual economic value by the application of this improper legal standard. Such a suggestion is contrary to the express declaration of this Court in the *Milwaukee* case; and the Commission itself has recognized in these very proceedings* that reorganization value (which it termed "the actual worth of the properties to their owner") may be greater than physical or rate-making value.

Similarly, the reliance by the Court of Appeals on general language of the Commission, and its statement (C. R. 28) that "The Commission was convinced that the New Orleans did not have a value in excess of $83,700,000", overlook the fact that any such determinations are fundamentally bound up with the application of an improper legal standard by the Commission as above described. The Commission's limitation of the "capitalization" of the New Orleans to $83,700,000 was *not* used solely from the standpoint of the "public interest" in a proper capitalization as the Court of Appeals suggests (C. R. 28), *but as an actual maximum limitation on the total principal amount of securities to be issued in satisfaction of the private rights of the Secured Serial Bondholders.* Until the proper legal standard of earning power has been given full application in the determination of the reorganization value of the New Orleans properties, questions of the principal amount and quality of the new securities which will satisfy those rights cannot possibly be properly determined.

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* *Missouri Pacific Railroad Company Reorganization*, 257 I. C. C. 479, 522 (1944), quoting with approval the Commission's determinations in *Chicago Great Western Railroad Company Reorganization*, 247 I. C. C. 193, 195 (1941).

All of the foregoing is particularly emphasized by the fact that the so-called physical value used as a maximum limitation does not even include substantial properties owned by the New Orleans, a fact ignored by the courts below. Thus allowances of working capital made by the Commission in physical valuations represent not the amount of working capital which a carrier actually has, but a judgment of the Commission's Bureau of Valuation as to the amount necessary to enable it to conduct its carrier activities (R. 325-330). The record establishes (D. R. 28505, 28511) that as of the effective date of the Commission's plan the New Orleans had over $3,000,000 of working capital in addition to that included in the physical valuation. Similarly, additional cash funds of $1,511,887 in Account 704, Capital and Other Reserve Funds, $256,866 in Account 704½, Maintenance Funds, and approximately $3,260,000 of bridges and other physical assets in Account 702½-B, Donations and Grants, are not included in the physical value used by the Commission (R. 766-773). Even if, contrary to all precedent, the physical value of the New Orleans properties could be used as a maximum limitation upon the new securities to be issued therefor, a physical valuation which does not even include approximately $8,000,000 of these properties cannot possibly be used as such a limitation.

II

In the alternative, the decision below has decided an important question of Federal law which has not been, but should be, settled by this Court.

We have hereinbefore shown, we believe, that the application of physical value made in these proceedings by the Commission and the courts below is squarely in conflict with the decisions of this Court in the *Consolidated Rock Products* and *Milwaukee* cases, and with the prior decisions

of various Courts of Appeal and the Commission itself above cited. If, however, the suggestion should for any reason be upheld that these cases can be distinguished on the ground that the earnings valuations there involved were less than the physical values, then it is submitted that the present case presents an important question of Federal law which has not been, but should be, settled by this Court.

The decisions above referred to held earning power, the justified expectation of the owners of property of income from it, to be the criterion of reorganization value. There is no intimation that the value so determined is to be limited by physical or rate-making value, and as has been pointed out,* any such limitation would deprive the owners of the property of part of its economic value. Both for the present case and as a guide to the courts below in future reorganization proceedings any such suggestion, if not specifically contrary to prior decisions, should now be definitely repudiated by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the cause numbered and entitled on its docket, "No. 14,272, Chemical Bank & Trust Company, as Trustee under the Indenture, dated as of December 1, 1926, securing the Missouri Pacific Secured Serial Bonds, Appellant, *vs.* Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, et al., Appellees", to the end that said cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals entered in said cause

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* See pp. 9-10, *supra*.

be reversed; and that your petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated, January 11, 1952.

Respectfully submitted,

EMMET MCCAFFERY
61 Broadway
New York 6, N. Y.
Attorney for Chemical Bank & Trust Company, as Trustee as aforesaid.

DORR, HAND & DAWSON,
Of Counsel.

APPENDIX

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U. S. C., Sec. 205) are as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be

adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the

respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis

which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 524.

CHEMICAL BANK & TRUST COMPANY, AS TRUSTEE UNDER THE INDENTURE, DATED AS OF DECEMBER 1, 1926, SECURING THE MISSOURI PACIFIC SECURED SERIAL BONDS,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 524.

CHEMICAL BANK & TRUST COMPANY, AS TRUSTEE UNDER THE INDENTURE, DATED AS OF DECEMBER 1, 1926, SECURING THE MISSOURI PACIFIC SECURED SERIAL BONDS,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported

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* A list of abbreviations and references used in this brief is on page i, *supra*.

at 191 F. 2d 265 (8 Cir. 1951). The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Question Presented.

Whether the holder of a junior interest [5¼% Secured Serial Gold Bonds of Missouri Pacific Railroad Company] in a bankrupt railroad company have been accorded a fair and equitable position in the Plan of Reorganization as required by Section 77 of the Bankruptcy Act, 11 U. S. C. §205.

Statement and Argument.

On January 28, 1952, this Court denied certiorari in *James B. Morris, et al.* v. *Group of Institutional Investors, et al.* (October Term 1951, No. 415). The first question presented by that Petition was exactly the same as the question presented by this one. See Brief of respondent Manufacturers Trust Company in No. 415, dated December 6, 1951, p. 2; Petition for Writ of Certiorari in No. 415, p. 7.

In its brief in opposition in No. 415, this respondent pointed out that "Petitioners have received fair and equitable treatment under the Plan" (Brief, p. 7) and that "the method of allocation does not conflict with the decisions of this Court" (Brief, p. 8). As in No. 415 the Commission and the Courts below recognized and followed the principles declared by this Court in *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448 (1943) and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific*

Railroad Company, 318 U. S. 523 (1943). No occasion for the application of other or different principles is here presented.

Conclusion.

For the reasons set forth in its brief in No. 415, respondent respectfully submits that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
JAN 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 525

ALLEGHANY CORPORATION,
Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

PETITION OF ALLEGHANY CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

ADRIAN L. FOLEY,
EDMUND O'HARE,
Attorneys for Petitioner.

Dated: January 11, 1952.

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Abbreviations And References Used In This Petition And Brief

P.R. I —Printed Transcript of Record in Circuit Court Appeals Nos. 12,130—12,136, inclusive.

P.R. II —Printed Transcript of Record in Circuit Court Appeals Nos. 13,367—13,369, inclusive, and 13,371—13,373, inclusive.

P.R. III —Printed Transcript of Record in Circuit Court Appeals Nos. 14,264—14,274, inclusive. (By stipulation (P.R. III, pp. 1093-1094), the records on appeal in Appeals Nos. 12,130—12,136, inclusive, and in Appeals Nos. 13,367—13,369, inclusive, and 13,371—13,373, inclusive, were made part of the record on appeal in Appeals Nos. 14,264—14,274, inclusive).

P.R. IV —Printed Volume containing:

1. Circuit Court mandate, dated September 9, 1947, referring proceedings back to District Court.
2. District Court Order No. 3160, entered September 19, 1947, referring proceedings back to Commission.
3. Petition of George H. Walker *et al.* (No. 756-A) and Petition of Irving Trust Company (No. 757), filed in District Court March 23, 1937.

P.R. V —Printed Transcript of proceedings in the United States Court of Appeals for the Eighth Circuit on Appeals Nos. 14,256 and 14,264—14,274, inclusive, including that Court's opinion and judgment of August 14, 1951.

D.C.R. —Volume LII of the Record of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, In the Matter of Missouri Pacific Railroad Company, Debtor, In Proceedings for the Reorganization of a Railroad, No. 6935, which Volume contains the Fourth Supplemental Report dated August 2, 1949 and Fifth Supplemental Report and Order, both dated December 29, 1949, of the Interstate Commerce Commission, embodying the present plan of the Missouri Pacific System.

Circuit Court —United States Court of Appeals for the Eighth Circuit.

Commission —Interstate Commerce Commission.

District Court —District Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

Gulf Coast Lines—New Orleans, Texas and Mexico Railway Company and subsidiaries, except IGN.

IGN —International-Great Northern Railroad Company.

MOP System —Missouri Pacific Railroad System, including the MOP, Gulf Coast Lines, and IGN.

MOP —Missouri Pacific Railroad Company.

NOTM —New Orleans, Texas and Mexico Railway Company.

Plan —Plan of Reorganization of the Missouri Pacific System embodied in the Interstate Commerce Commission's Fifth Supplemental Order of December 29, 1949 in Finance Docket No. 9918.

S.S. —Summary Statement.

Exhibits offered in evidence before the Interstate Commerce Commission are referred to as Commission Exhibits. Exhibits offered in evidence before the District Court are referred to by the name of the party offering them, and Exhibits offered in evidence before the District Court at the hearing on confirmation of the Plan, on June 25-28, 1951, are referred to as Confirmation Exhibits. References are to page numbers except in the case of Exhibits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

ALLEGHANY CORPORATION,
Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Alleghany Corporation, being the owner of 8,000 shares of common stock of MOP, respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit entered August 14, 1951 (P.R.V., pp. 14-36) and the judgment entered thereon (P.R.V., pp. 37-40), which affirmed Order No. 3571 of the District Court entered October 3, 1950 (P.R.III, pp. 948-954), in proceedings to reorganize the MOP and subsidiary debtors, under Section 77 of

the Bankruptcy Act. District Court Order No. 3571 approved a plan of reorganization for the MOP and subsidiary debtors, adopted the findings and conclusions of the Commission with respect to such plan as the findings and conclusions of the District Court, approved such plan in all respects, overruled all objections thereto and denied all claims for equitable treatment. Since the District Court adopted the findings and conclusions of the Commission contained in the Commission's Fourth and Fifth Supplemental Reports, and since the Circuit Court affirmed the order of the District Court, all references to the action of the Commission apply equally to the action of said Courts.

Petitioner seeks a review of the propriety of the Commission's findings that the maximum permissible capitalization of the MOP System for reorganization purposes should be limited to approximately $612,000,000, and that, as a consequence, the equity of the holders of MOP common stock is without value and that such holders should not be participants in any reorganization. Since such a review will require a consideration of the vital factual highlights at the very least, the Summary Statement will be somewhat more extended than usual, but not more than the importance and the nature of the questions presented require. Also, because the Commission considered the MOP System's income through most of the year 1949 (D.C.R., p. 28686) and the Circuit Court had before it such income figures for the year 1950 (P.R.V., p. 51), but did not consider or have before it many other material factors bearing on the valuation and maximum permissible capitalization of the MOP System for such years, Petitioner begs leave to refer to subsequent proceedings affecting the Plan in order that this Court may properly weigh the other pertinent factors.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254(1) and Title 11, U. S. Code, Section 47c (Section 24c of the Bankruptcy Act).

Opinions Below

The Commission's Fourth and Fifth Supplemental Reports, embodying the plan, are set forth in 275 I.C.C. Reports, beginning at pages 59 and 203, respectively.*

The District Court's opinion on the Plan is reported at 93 F. Supp. 832. The Court of Appeals' opinion is reported in 191 F. 2d 265.

Summary Statement

1. The proceedings in the District Court were instituted by the filing therein, on March 31, 1933, of petitions by MOP, by NOTM, and by IGN, stating their desire to effect a plan of reorganization pursuant to Section 77 of the Bankruptcy Act, and the approval, on that date, of such petitions by the District Court (P.R.I., 2328-2329). Subsequently the other debtors filed similar petitions in such proceedings, which petitions were approved by the District Court (P.R.I., pp. 2329-2330). The railroads involved in these proceedings consist of (1) the MOP and seven wholly-owned subsidiaries (P.R.I., p. 303), (2) NOTM and fourteen wholly-owned subsidiaries

* Commission Reports with respect to previous plans of reorganization in these proceedings are as follows:

Date of Report	*Reference*
January 10, 1940	239 I.C.C. 7
April 9, 1940	240 I.C.C. 15
July 4, 1944	257 I.C.C. 479
December 9, 1944	257 I.C.C. 745

(P.R.I., p. 305), and (3) IGN and its wholly-owned subsidiary (P.R.I., pp. 308-309). In addition the plan provides that the properties of two non-debtor subsidiaries of the MOP are to be transferred to the new company (D.C.R., p. 28693). Approximately 93% of NOTM's capital stock is owned by MOP (D.C.R., p. 28476) and all of IGN's capital stock is owned by NOTM (D.C.R., p. 28477).

2. On October 21, 1935, MOP, NOTM, and IGN filed with the District Court a plan for their reorganization and the various subsidiary debtors involved in these proceedings (P.R.I., p. 2330). Such plan was subsequently filed with the Commission, as were other plans (P.R.I., pp. 2330-2331). Hearings on plans of reorganization were commenced by the Commission on February 4, 1936 (P.R.I., p. 634), and continued intermittently until September 30, 1937. The matter was submitted to the Commissioner on March 23, 1939 (P.R.I., p. 298) and the Commission issued its Original Report under date of January 10, 1940 (P.R.I., p. 298), approving a plan of reorganization. In such Original Report and in its First Supplemental Report of April 9, 1940 (P.R.I., p. 483) the Commission fixed the total permissible capitalization of the new company at approximately $560,000,000 (P.R.I., pp. 407 and 498). Hearings on such 1940 plan of reorganization were held before the District Court on July 9, 1940 (P.R.I., p. 2155), and on October 7-10, 1940 (P.R.I., p. 2280). Thereafter, the District Court filed its opinion dated June 20, 1941 (P.R.I., p. 2328) and its order dated July 12, 1941 (P.R.I., 2355; 39 F. Supp. 436), approving the 1940 Commission plan, with minor corrections not here material. Appeals were taken to the Circuit Court, and, without deciding the appeals on the merits, on May 8, 1943 the Circuit Court remanded the appeals to the

District Court to determine whether the 1940 plan should be referred back to the Commission (P.R.II., p. 48). Further hearings were held before the District Court on July 16, 1943 (P.R.II., p. 50), and on July 29, 1943 the District Court referred the matter back to the Commission (P.R.II., pp. 124-127; 50 F. Supp. 936).

3. Further hearings were conducted by the Commission on October 19, 20 and 21, 1943 (P.R.II., p. 128). The Commission issued its Second Supplemental Report under date of July 4, 1944 (P.R.II., p. 652) and its Third Supplemental Report on October 9, 1944 (P.R.II., p. 783). It declined to increase the maximum permissible capitalization above the $560,000,000 originally set by it in 1940 (P.R.II., pp. 714-715).

4. Hearings were held before the District Court on the 1944 plan during the first part of 1945 (P.R.II., pp. 917-923), and on January 22, 1946 (P.R.II., pp. 1119-1123; 64 F. Supp. 64) the District Court approved the 1944 plan. Appeals again were taken, and on September 9, 1947, without deciding the case on the merits, the Circuit Court vacated the District Court's approval order and remanded the cause with directions to return the 1944 plan to the Commission (P.R.IV.; 163 F. 2d 1022).

5. The Commission held hearings on plans on March 23-26, 1948 (P.R.III., p. 5), and issued its Fourth Supplemental Report on August 2, 1949 (D.C.R., p. 28469) and its Fifth Supplemental Report on December 29, 1949 (D.C.R., p. 28460), approving a modified plan of reorganization. After hearings on March 27—April 1, 1950 (P.R.III., p. 560) the District Court, by opinion filed July 29, 1950 (P.R.III., p. 915; 93 F. Supp. 832), and order No. 3571 filed October 3, 1950 (P.R.III., p. 948), approved the Commission's 1949 plan. The Circuit Court affirmed the judgment of the District Court on August 14, 1951 (P.R.V., pp. 14-36, 37; 191 F. 2d 265).

6. In its Fourth and Fifth Supplemental Reports and Fifth Supplemental Order the Commission found that the equity of the holders of Missouri Pacific common stock is without value and that such holders should not participate in the reorganization (D.C.R., pp. 28592-28593, 28668-28670), and that "Alleghany Corporation on the basis of its present holdings of Missouri Pacific securities will have no interest in the reorganized company" (D.C.R., p. 28605). The Commission also found that "a reasonable future normal year's earnings available for payment of interest" will be $25,450,000 for the MOP System (D.C.R., p. 28545), and limited the new system capitalization to $612,000,000 (D.C.R., p. 28556), inclusive of equipment obligations as of January 1, 1948 but exclusive of Plaza-Olive bonds and new securities distributable to general unsecured creditors.

This Court's attention is also called to the following: On July 13, 1951 the Institutional Group, and others, filed a petition with the District Court, praying for a Commission hearing and report on "changes, facts and developments" pursuant to Section 208(a)(1) of the Bankruptcy Act, and on the same date the District Court referred the petition to the Commission. Replies to the petition were filed, and hearings were held by the Commission on November 27-December 3, 1951. Such matter is still pending before the Commission.

Significance of the dates involved in the Commission's original report of January 10, 1940.

7. As stated above, the Commission held its first reorganization hearings on February 4, 1936 (P.R. I, p. 634), the issues were submitted March 23, 1939 (P.R. I, p. 298) and the Commission issued its Original Report on January 10, 1940 (P.R. I, p. 298; 239 I.C.C. 7). These dates are peculiarly significant because the Trustee's agents and

the Commission throughout these proceedings have been unduly influenced in their estimates and judgments by the depression conditions and particularly the earning record of the MOP System during this period.

The average weighted railroad construction cost index for Region VIII of the United States, which Region includes the territory in which the MOP System operates, for the years 1938 and 1939 was 150, the lowest since 1917, except for the years 1931 to 1936 inclusive, when it averaged 140.8. In 1935, during the preparation of the first proposed reorganization plans and supporting data, the System's earnings of $5,998,523 (P.R. I, p. 333) available for interest reached their lowest point in the 25-year period 1925 to 1950 inclusive (P.R. I, pp. 333-334; P.R. II, pp. 659-660; D.C.R., pp. 28531-28532; Debtor's Exhibit No. 1, introduced in evidence before District Court, March 1950, P.R. III, p. 775; P.R. V, p. 51). Similar earnings of $7,600,435 for 1938 (P.R. I, p. 334) and $10,097,423 for 1939 (P.R. II, p. 659) were the second and third lowest in this 25-year period. It is Petitioner's contention that the Commission in its Original Report of January 10, 1940 was unduly influenced by these depression conditions in finding that the MOP System's permissible maximum capitalization should be limited to $560,000,000; that the Commission in adding $52,000,000 (by increasing the capitalization to $612,000,000) to the capitalization in its Fourth and Fifth Supplemental Reports of 8/2/49 and 12/29/49 arbitrarily ignored the enormous changes in the System's physical values since 12/31/35 and its vastly improved earning record and earning capacity since 1939, and failed to increase the capitalization sufficiently to even partially compensate for the reduction in the composite average yields on Railroad bonds from 12/31/35 to 12/31/49 inclusive; and that the underlying physical values and income factors upon which the Commission based its original capitaliza-

tion, improperly controlled the capitalization fixed in its Fourth and Fifth Supplemental Reports. This is graphically presented in Appendix B hereof.

Property Valuation Data for the System

8. The Report of the Commission's Bureau of Valuation which fixed the elements of value for the MOP, the Gulf Coast Lines and the IGN, separately and combined as a system as of 12/31/35, was filed in the 1936 Commission hearing (P.R. I, p. 215). The Railroad Construction Indexes, issued August 1, 1951, and compiled by the Engineering Section of the Bureau of Valuation of the Interstate Commerce Commission for Region VIII which Region includes the territory in which the debtor railroads operate, lists the weighted average yearly cost index factors for the period 1915 to 1950 inclusive as follows:

1915:	'16:	'17:	'18:	'19:	'20:	'21:	'22:	'23:	'24:	'25:	'26
103 :	112:	139:	170:	187:	219:	175:	158:	176:	172:	168:	168
'27 :	'28:	'29:	'30:	'31:	'32:	'33:	'34:	'35:	'36:	'37:	'38
168 :	164:	166:	160:	148:	137:	134:	140:	143:	143:	152:	150
'39 :	'40:	'41:	'42:	'43:	'44:	'45:	'46:	'47:	'48:	'49:	'50
150 :	153:	164:	186:	198:	198:	207:	227:	252:	278:	279:	284

This is an average of 149.2 for the period 1928 to 1940 inclusive, 151 for the period 1938 to 1940 inclusive, and 227.3 for the period 1941 to 1950 inclusive.

Commission's valuation of the System as of 12/31/35.

9. The Commission in its Original Report, decided January 10, 1940, adopted the physical valuations of its Bureau of Valuations and found the following elements of value as of 12/31/35 for the System, including four small companies: Cost of reproduction less depreciation

$433,772,838 (P.R. I, p. 340); value of lands and rights $50,966,605 (P.R. I, p. 340); working capital $8,478,200 (P.R. I, p. 340); and four small companies $3,214,861 (P.R. I, p. 345), making an overall valuation of $496,-432,504. The Commission also gave consideration to $60,150,487 book value (P.R. II, p. 711) of investments in affiliated companies.

Commission's valuation of the System as of 12/31/45 and '46.

10. Throughout the proceedings from January 10, 1940 until its Fourth Supplemental Report decided August 2, 1949 the Commission adhered to these valuations (P.R. II, p. 710). In its Fourth Supplemental Report it adopted the physical valuations of its Bureau of Valuation, which, although represented as the elements of value as of December 31, 1945, were based on a pre-war cost factor of 152 (P.R. III, p. 159) as against a cost factor of 197 prevailing in 1945 and 227 in 1946. (The correct 1946 cost factor of 227 (D.C.R., 28667-28668; P.R. III, p. 158) is 115% of the correct 1945 cost factor, which would therefore be 197.) The Commission found the following elements of value for the System as of 12/31/45 and '46: Cost of reproduction less depreciation $471,544,764 as of 12/31/45 (D.C.R., p. 28512), plus $70,731,714 (D.C.R., p. 28513) to give effect to the increased prices alleged to prevail in 1946, making a total reproduction cost less depreciation of $542,276,478 as of 12/31/46; value of lands and rights $54,076,127 as of 12/31/45 (D.C.R., p. 28512); working capital $14,475,932 (D.C.R., p. 28512); net additions and betterments from the period 12/31/45 through 12/31/47 in the amount of $28,634,748 (D.C.R., pp. 28512-28513); making an overall valuation of $639,463,285 (D.C.R., p. 28513). The Commission allegedly also gave consideration

to estimated value of System investments of $73,498,933 as of 12/31/47 (D.C.R., p. 28513).

If the Commission instead had applied the 1946 cost index factor of 227 (which is comparable to an average of 227.3 for the 10-year period 1941 to 1950 inclusive), it would have resulted in a comparable System reproduction cost less depreciation of $704,016,332 and an overall valuation of $801,203,139. Although the Commission Bureau of Valuation does not maintain period price indexes for regions and for the United States as a whole (such indexes being tailor-made for each occasion), the Commission refused to apply the cost index factor of 227 to find the elements of value as of 1946 for the System on the ground that it was a "spot multiplier" (D.C.R., p. 28668). It considered the earning record of the System for 1945 through most of 1949 inclusive, but failed to consider or mention that the cost index factor increased from 197 (see p. 9 hereof) to 279 (see p. 8 hereof) between 1945 and 1949 inclusive. It thus weighed the earnings factors for the period against an inadequate cost and valuation background, thereby deprecating the inadequacy of the prevailing freight and passenger rates which so vitally affect the "earning power" and reorganization value of a railroad.

Valuation of the System as of 12/31/50, if the cost factor used in Ex Parte 175 is applied.

11. The Commission has belatedly and partially recognized the inadequacy of its valuation figures in Ex Parte 175, a freight rate proceeding. In Exhibit 15, Ex Parte 175, entitled "Interstate Commerce Commission, Bureau of Valuation, Elements of Value of Property used in

common-carrier service January 1, 1950," the following valuation formula was adopted:

> "The established level of these period prices contemplate 'tunnelling through' the post-war price peaks substantially above the 1936-1940 depression pre-war level and about 20 to 25 percent below the 1949 spot price levels. * * * Because of present world conditions we would recommend period prices as of December 31, 1950—about 10 per cent higher than those in this estimate."

The use of this formula based on a 20% reduction from 1949 so-called "spot price" levels plus 10% to reflect so-called period prices as of 12/31/50, would require the use of a cost factor of 245.5 (279—20%+10%) in computing the System's reproduction cost less depreciation as of 12/31/50, which, if applied to the Commission's reproduction cost less depreciation figure of $471,544,764 (D.C.R., p. 28512) as of 12/31/45, would produce a System reproduction cost less depreciation of $759,894,387 as of 12/31/50 and, after the addition of the following pertinent elements of value as of 12/31/50, an overall valuation of $1,094,128,515: $122,625,023 net additions and betterments from 12/31/45 to 12/31/50 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56); $54,076,127 value of lands and rights (D.C.R., p. 28512); $86,269,666 estimated value of investments as of 12/31/50 (Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276); and net current assets of $71,263,312 (Alleghany Confirmation Exhibit No. 5, Confirmation hearing transcript June 26, 1951, p. 54).

Selected Facts Bearing on Valuation

12. The System's *net* additions and betterments from 12/31/35 to 12/31/50 amounted to $201,936,737 (Alle-

ghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56), which is 40.68% of the Commission's System valuation of $496,432,504 as of 12/31/35. (See p. 9 hereof.) The three years 1948-1950 totalling $93,990,275 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56) of this 15-year period account for 46.54% of such net additions and betterments, although the three-year period represents only 20% of the entire period.

(a) If the System's net additions and betterments from 12/31/35 to 12/31/47 inclusive, amounting to $107,946,462 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56), are added to the Commission's valuation figure of $496,432,504 (see p. 9 hereof) as of 12/31/35, the resulting valuation figure becomes $604,378,966, as contrasted with the Commission's comparable valuation figure of $639,463,285 (D.C.R., p. 28513). Thus, the Commission in its Fourth and Fifth Supplemental Reports, dated respectively 8/2/49 and 12/29/49, only increased its 1935 valuation figure by 5.8% to compensate for the increased cost factors, whereas between 12/31/35 and 12/31/47 the cost index factor had increased 75%.

Furthermore, although the Commission recommended the remand of its 1944 plan for reconsideration, due to a net System debt reduction of $45,463,961 (D.C.R., p. 28471) between 1/1/43 and 1/1/48, it in reality only increased its System valuation figure $35,084,319 in its Fourth and Fifth Supplemental Reports to compensate for all the elements affecting increases in value since the depression year of 1935, including the debt reduction and the increased cost factors.

(b) If the System's total net additions and betterments of *$201,936,767* (Alleghany Confirmation Exhibit No. 8,

Confirmation hearing transcript June 26, 1951, p. 56) for the period from 12/31/35 to 12/31/50 inclusive are added to the Commission's valuation of $496,432,504 as of 12/31/35 (see p. 9 hereof), resulting in $698,369,271, the Commission's valuation of $639,463,286 as of 12/31/46 (D.C.R., p. 28513) completely ignores $58,905,985 of net additions and betterments since 12/31/35 and all increased costs since that date, in spite of the fact that the average weighted cost index factor from 12/31/35 to 12/31/50 inclusive has increased 99%.

(c) These figures do not take into consideration the difference in the value of the System's investments in affiliated companies nor the difference in the System's net quick assets during the period 12/31/35 to 1950, inclusive. The Commission valued such investments at $60,150,487 (P.R. II, p. 711) as of 12/31/35 and at $73,498,933 (D.C.R., p. 28513) as of 12/31/47, as contrasted with an estimated value made by the financial agent of the Trustee of $86,269,666 (Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276) as of 12/31/50. The net current assets of the System increased from a deficit of $133,875,751 as of 12/31/36 (P.R. I, p. 338) to $62,585,991 as of 12/31/47 (D.C.R., 28509), and $71,263,312 as of 12/31/50 (Alleghany Confirmation Exhibit No. 5, Confirmation hearing transcript June 26, 1951, p. 54).

(d) The improvement of the System's property and equipment since 1935 as a result of the additions and betterments as above indicated, and maintenance expenditures of more than $800,000,000 (Independent Directors Confirmation Exhibit No. 2, Confirmation hearing transcript June 27, 1951, pp. 271-272), has put the System in excellent physical condition, the best in 26 years (P.R. III,

p. 47) and will enable the System to earn a greater rate of return than heretofore on such improvements. The following limited examples merely highlight the vast expansion and improvement of the System's properties and facilities: Installation, where practicable, of centralized traffic control which is equivalent to providing a double track (Confirmation hearing transcript June 27, 1951, pp. 210-211); adoption of a dieselization program which by the end of 1951 will result in an estimated annual saving of $13,304,700 (Confirmation hearing transcript June 28, 1951, pp. 377-380); modernization of passenger equipment and installation of heavier rails, shorter and permanent steel bridges and creosoted ties and bridge material and grade reductions (P.R. III, pp. 47-53; Commission Exhibit No. 975; P.R. III, p. 783, Debtor's District Court approval hearing Exhibit No. 4).

(e) The only evidence introduced in the March 1948 hearings before the Commission as to the nature and permanence of the post-war price increases was that of Doctor Theodore Yntema to the effect that he did not expect a depression comparable to that in the thirties in the next 20 or 30 years (P.R. III, pp. 152-154), and that it is unlikely that non-agricultural price levels in the next ten years will average as much as 10% below the levels prevailing at the time he testified (P.R. III, p. 156).

The 1936 "Normal Year" Forecast

13. The so-called "Normal Year" forecast (Commission Exhibits Nos. 242, 374; P.R. I, pp. 747-749, 999-1000) was the result of a study made by Mr. C. E. Perkins, Chief Traffic Officer, MOP Lines, and other agents of the Trustee in 1935 (Commission Exhibits Nos. 243, 244, 245, 246, 247; P.R. I, pp. 751, 773-815) with respect to the traffic volume and revenue, pertaining to separate

commodities classified in the following five main commodity groups: Group I—Agriculture; Group II—Animals and Products; Group III—Products of Mines; Group IV—Products of Forests; and Group V—Manufactures and Miscellaneous. The study also covered overall costs and earnings available for fixed charges. The fundamental concept of the "Normal Year" forecast made it inappropriate as a basis for making the required statutory finding of "the probable prospective earnings" of the System. The "Normal Year" forecast was prepared and presented to the Commission in the depth of the world's worst depression. The System's income available for interest had declined from a high of $34,173,017 in 1929 to $5,998,523 in 1935 (P.R. I, p. 333). The earnings available for fixed charges for 1939, the year in which the Commission formulated its original plan, were only $10,097,423 (P.R. II. p. 659), the third lowest since 1925. *Mr. Perkins testified that the average conditions in 1930 and 1931 were pretty close to normal* (P.R. I, pp. 1140, 1142), *that the forecast did not represent the maximum level of future traffic, but that, on the contrary, after the "Normal Year" is reached there will be a somewhat steady growth in traffic as there has been in past normal periods* (P.R. I, p. 778). The "Normal Year" forecast did not even approach the author's idea of a normal year, since the System's income available for interest in 1930 was $28,217,274 and in 1931 was $23,321,317 (P.R. I, p. 333), making an average of $25,769,295. Furthermore the "Normal Year" forecast made no provision for the predicted normal growth (P.R. I, pp. 846, 1190-1191).

14. The forecast of traffic volume was primarily based on the average traffic conditions prevailing during the 7-year period (1928-1934) (P.R. I, pp. 774-775, 778-779, Commission Exhibits Nos. 244, 245, 246, 247) and the revenue forecast was preponderantly based on conditions

prevailing in 1934 and 1935 (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247). In spite of the fact that the earnings for the years which Mr. Perkins regarded as *about normal* were on the average greatly in excess of the "Normal Year" estimated earnings, the Commission in its Original Report of January 10, 1940 adopted the "Normal Year" forecast of $20,412,204 (P.R. I, pp. 747-749, Commission Exhibit No. 242) (revised to $22,059,052 (P.R. I, p. 335) to reflect adjustments that in no way altered the full acceptance of the "Normal Year" traffic and revenue forecast) as measuring the "*earning power*" of the System. Within two years thereafter the System's earnings available for fixed charges more than tripled the 1939 earnings and subsequently have ranged as high as 6½ times such 1939 earnings. The System earnings available for interest since 1940 are as follows: 1940—$13,495,717 (P.R. II, p. 659); 1941—$30,607,244 (P.R. II, p. 659); 1942—$66,205,617 (P.R. II, p. 660); 1943—$47,717,858 (D.C.R., p. 28531); 1944—$47,833,479 (D.C.R., p. 28531); 1945—$34,257,324 (D.C.R., p. 28531); 1946—$30,369,166 (D.C.R., p. 28532); 1947—$32,946,964 (D.C.R., p. 28532); 1948—$40,707,556 (booked) (P.R. III, p. 775, Debtor's District Court approval hearing Exhibit No. 1); 1949 (strike year)—$28,925,182 (booked) (P.R. III, p. 775, Debtor's District Court approval hearing Exhibit No. 1); 1950—$45,595,589 (booked) (Alleghany Confirmation hearing Exhibit No. 1, Confirmation hearing transcript June 26, 1951, pp. 42-43).

Change in "Traffic Consist" Makes "Normal Year" Forecast Immaterial

15. The complete unreliability of the "Normal Year" forecast, even as revised in the Commission's Fourth and Fifth Supplemental Reports, to measure the earning capacity of the System for any year since 1941 or for

any future year, is indicated by the extent the "traffic consist" of the "Normal Year" would affect the earnings in any year since 1941, if applied to the total freight traffic for any such year. The "traffic consist" as herein used refers to the ratio existing between the total carload traffic for each of the five main commodity groups and the total carload traffic. As an example, if the "traffic consist" of the "Normal Year" were applied to the total 1950 carload traffic, subject to the rates and costs prevailing in 1950, the net revenue from railway operations would have been reduced $9,520,011 (see Appendix A) and the income available for fixed charges would have been reduced approximately $5,521,607. These figures, of course, are based on the assumption that the total cost of handling the same overall volume of traffic in 1950 would not vary materially.

16. This improvement in the System's earning power is largely due to a shift in the "commodity consist" to Manufactures and Miscellaneous, which generates a much higher net revenue than is generated by the other main Commodity Groups. The System's "Manufactures and Miscellaneous" *carload traffic* for 1950 amounted to 44.97% of its total 1950 carload traffic (Alleghany Confirmation hearing Exhibits Nos. 37A, B and C, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206), as contrasted with the "Normal Year" forecast of 33.49% (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247); and the System's *freight revenue* from "Manufactures and Miscellaneous" traffic for 1950 amounted to 54.25% of its 1950 total freight revenue (Alleghany Confirmation hearing Exhibits Nos. 37A, B and C, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206), as contrasted with the "Normal Year" forecast of 41% (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247).

The following table has been computed from a study by Delbert M. Steiner, Transportation Cost Analyst, Interstate Commerce Commission, published May 1951 by Association of Interstate Commerce Practitioners:

Over 200%	176 to 200	151 to 175	126 to 150	101 to 125	76 to 100	51 to 75	26 to 50	0 to 25	Below 0
100	100	100	82	72.5	74	57	28	31	7

The figures above the horizontal line represent the percentage ranges in which the different commodities are listed, based on the extent the revenue generated by each commodity is above or below out-of-pocket cost. The figures below the horizontal line show the percentage of the total number of commodities in each vertical column represented by commodities in the Manufactures and Miscellaneous Group. Although Mr. P. J. Neff, Chief Executive Officer of the Trustee (P.R. III, p. 30), could not give the percentage figures, in the Confirmation hearing, he verified that System traffic in commodities classified in the Manufactures and Miscellaneous Group was the most profitable (Confirmation hearing transcript June 27, 1951, pp. 182-184).

17. This change in the fundamental character of the System's traffic and earning power could not have been contemplated by Mr. Perkins and his associates when they prepared the "Normal Year" study, nor considered by the Commission when it issued its Fourth and Fifth Supplemental Reports, because the increase in the "Normal Year" forecast in these Reports was merely to compensate for the unanticipated traffic in citrus fruit and chemicals (D.C.R., pp. 28534-28539).

Economic Changes Make "Normal Year" Forecast Immaterial

18. After the Commission indicated in its Memorandum Brief filed in response to the Circuit Court's order of May 24, 1947 (P.R. IV, Circuit Court mandate) that the reduction in indebtedness, interest payments and other matters required a reconsideration of the 1944 Commission Plan then pending on appeal before the Court of Appeals for the Eighth Circuit, it was remanded and hearings before the Commission on new plans were commenced on 3/23/48. Statistics in respect of the System's financial, operating and physical condition were brought down to 12/31/47 (P.R. III, pp. 14-53, 136-137, 312, Commission Exhibits Nos. 940-975). A great mass of statistical information was introduced showing the vast economic improvement (in the nation as a whole and particularly in the region served by the System) since the depression year (P.R. III, pp. 143-152, 183, Commission Exhibits Nos. 985-997). The highlight of this testimony was that the nation as a whole at the time had almost recovered from the depression to its long-term growth trend "at a compound annual rate of 4.1% per year" (P.R. III, p. 148) and that the growth rate in the region served by the System had in general surpassed the growth rate of the nation as a whole (P.R. III, pp. 144-146).

Predictions of Dr. Theodore Yntema

19. Doctor Theodore Yntema, an eminent economist (P.R. III, pp. 137-143), whose standing has been equally recognized by the Government and private enterprise, testified *as to the stable and permanent nature of these economic advances and improvements* (P.R. III, pp. 143-157). His testimony was neither contradicted nor rebutted by any oral or documentary evidence. He expressed the

opinion, based on a documented study of long and short term economic statistics and trends, governmental policies in the field of banking, industry, labor and defense: (a) that economic conditions following World War I could not be used as a guide in anticipating economic trends after World War II (P.R. III, p. 154); (b) that he did not expect a repetition of the late depression conditions in the next 20 or 30 years (P.R. III, pp. 152-154) nor a price recession of more than 10% from the levels prevailing at the time he testified (P.R. III, pp. 155-156); (c) that the territory served by the System from 1940 to 1947 has had a more rapid industrial growth than occurred in the nation as a whole (P.R. III, pp. 144-146) and will share fully in the future industrial growth of the country (P.R. III, p. 149); (d) that the System's then reproduction cost less depreciation (exclusive of lands and rights and other pertinent elements of value) was approximately $800,000,000 (P.R. III, p. 160) and was not likely to fall and remain below $720,000,000 (P.R. III, p. 160); (e) that the System's reproduction cost less depreciation should measure its economic value, as defined in the Commission's Supplemental Report of 7/4/44 (P.R. III, p. 163), which was prepared with the benefit of this Court's opinions in the Milwaukee* and Western Pacific** cases; and (f) that his opinion as to the System's economic value was based on the testimony of the System's chief executive officer that 3% of the 1947 net operating income of all Class I railroads, with Federal taxes added back, accrued to the System with good prospects that it will obtain a higher percentage in the future (P.R. III, pp. 164-166, 44).

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* 318 U. S. 523 (1943).
** 318 U. S. 448 (1943).

Economic Changes Since 1947 Makes "Normal Year" Forecast Immaterial

20. Since the close of these hearings the economic statistics upon which the above testimony was predicated have been revised to the end of 1950 and show a vast and steady improvement in economic conditions. Space will permit only a sampling of what has occurred since the hearings in the spring of 1948. As contrasted with President Truman's January 1950 forecast of a national output of $300,000,000,000 within five years, the gross national product amounted to $72,193,000,000 in 1935 (Alleghany Confirmation Exhibit No. 15, Confirmation hearing transcript June 26, 1951, pp. 66, 74-75) when the "Normal Year" was in the process of compilation and amounted to only $91,339,000,000 in 1939 (Alleghany Confirmation Exhibit No. 15), just before the Commission issued its Original Report adopting the "Normal Year" as the measure of the earning capacity of the System. The gross national product for 1947 was $233,264,000,000 (Alleghany Confirmation Exhibit No. 15) and for the post-war years (1946-1950) averaged $247,765,000,000 (Alleghany Confirmation Exhibit No. 15), which was more than three times the average gross national product for the depression period 1931-1939. Even during the war years the gross national product did not approach the post-war years, the figures for the war years being: 1942—$161,551,000,000; 1943—$194,338,000,000; 1944—$213,688,000,000; and 1945—$215,210,000,000 (Alleghany Confirmation Exhibit No. 15). The historical high point of $279,800,000,000 was reached in 1950 (Alleghany Confirmation Exhibit No. 15). The national income follows almost a parallel course.

New and Expanded Industrial Development in the System's Territory from 1940 to 1950

21. The rate of expansion of *major industries* and the establishment of *major new industries* for the period 1948-1950 inclusive on the System's lines was even greater than in the period 1940 to 1947 inclusive. For the 8-year period 1940-1947, there was an annual average of 37 expanded industries involving an annual average capital investment of $56,206,734 (P.R. III, pp. 39, 136-137, Commission Exhibit No. 971). In contrast, during the 3-year period 1948-1950 there was an annual average of 141 expanded industries involving an annual average capital investment of $78,540,500 (Debtor Confirmation Exhibit No. 1, Confirmation hearing transcript June 26, 1951, pp. 21-22). For the 8-year period 1940-1947 there was an annual average of 281 new industries established involving an annual average capital investment of $76,217,240 (P.R. III, pp. 39, 136-137, Commission Exhibit No. 971). In contrast, during the three-year period 1948-1950 there was an annual average of 409 new industries established involving an annual average capital investment of $90,634,966. In appraising the significance of this industrial expansion on the System's lines, Mr. Neff in the March 1948 hearings said "Generally speaking, it shows enormous expansion of peacetime industry which is creating tonnage for transportation by Missouri Pacific Lines" (P.R. III, p. 38).

The Revised "Normal Year"

22. Although Mr. Neff did not attempt to forecast a normal year in the light of all the changes since 1936 (P.R. III, pp. 101-102, 106-107, 112-113, 129-132), he did testify that, if at the time the original "Normal Year" earnings estimate was made, the increase in citrus fruit and chemical traffic *alone* had been anticipated, the "Normal Year" estimate of income available for interest,

computed at rates, costs and other factors prevailing at that time, would have had to be increased to $26,622,731 (P.R. III, pp. 33-41). Except to this limited extent the "Normal Year" has never been revised and no revised "Normal Year" has ever been forecast. Nevertheless, the Commission merely added $3,390,948 to the "Normal Year" forecast of $22,059,052, making a total of $25,450,000 (D.C.R., p. 28545) and adopted the latter figure as the *"reasonable future normal year's earnings available for payment of interest after Federal income taxes"* (D.C.R., p. 28545). Since the earning factor upon which the Commission purported to rely in fixing the permissible maximum capitalization of the System in its Fourth and Fifth Supplemental Reports was the original "Normal Year" earnings figure merely revised to reflect the estimated increase in earnings due to the unanticipated increase in citrus and chemical traffic, it cast aside all reason and logic in arbitrarily reducing Mr. Neff's estimate by the sum of $1,172,731, since his estimate was the only evidence in the record upon which a judgment could be predicated. Thus, the Commission without a scintilla of evidence to support its action, not only arbitrarily discounted Mr. Neff's estimate, but completely ignored all the other undisputed evidence in the record as to the present and probable future increased earning capacity of the System.

Facts Bearing on Earning Capacity

23. If a reasonably concurrent relationship between the fundamental factors of cost, rates and earnings for any particular year or significant period is observed in considering the System's earning capacity, it becomes obvious that the System has never been afforded an opportunity to demonstrate the extent to which it can earn more than

a minimum reasonable return on the value of its property for rate making purposes, *which is its economic value* for the purpose of reorganization under the law.

Rates of Return on Assumed Values

24. The use of a cost index factor of 152 (the approximate average for the four-year period 1937-1940) would result in a System reproduction cost less depreciation, value of lands and rights and working capital of $540,096,823 as of 12/31/35, and this valuation may be fairly accepted to test the rate of return during the 13-year period 1928-1940, since the cost index factor during such 13-year period averaged 149.2 (see p. 8 hereof.) In only one year during this period did the rate of return on this valuation exceed 6% (P.R. I, pp. 333-334; P.R. II, pp. 658-659). The average was 3.065%. Included in the computation of the rate of return is the income from System investments which were valued by the Commission as of 12/31/47 at $73,498,933 (D.C.R., p. 28513), but were not considered in fixing the above valuation.

The cost index factor averaged 227.3 for the ten-year period 1941-1950 (see p. 8 hereof). The ultra-conservative valuation figure of $801,203,139, referred to in paragraph 10 hereof, was computed by applying the cost index factor of 227 prevailing in 1946. This figure, adjusted to reflect one-half the net additions and betterments for the 5-year period 1946-1950 instead of merely the net additions and betterments for the years 1946 and 1947, would amount to $833,880,902. Assuming that this figure represents a conservative average valuation figure for the 10-year period 1941-1950, the System earned more than 6% on this valuation in only one year—and that a war year—the average rate of return being 4.858%. As in the previous computa-

tion, the income from System investments (estimated value $86,269,666 as of 12/31/50, Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276) is included, although the value of these investments is excluded from the valuation figure as well as the extraordinary amount of present net current assets.

Rates Have Not Been Increased Commensurate With the Rise in the Cost Index Factor.

25. Doctor Yntema testified that pre-war to the time he testified in March 1948, the rates have not risen proportionately with other prices (P.R. III, p. 175); that there has been no opportunity to find out how much the railroads could earn if they were given a reasonable opportunity (P.R. III, p. 182); that in his opinion they could earn an enormous lot more than they were permitted to earn at that time (P.R. III, pp. 163, 174-175, 182); and that he could not see how any public interest could conflict with the right of a railroad to earn a reasonable return on a fair value (P.R. III, pp. 181-182). No evidence was introduced to contradict this testimony.

After December 31, 1940 there were no freight rate increases until July 1, 1946, when the System was granted a general 6% increase but limited to a 3% increase on agricultural products (Confirmation hearing transcript June 27, 1951, p. 186). On January 1, 1947 a 20% increase went into effect, but this included the previous July increases of 6% and 3% (Confirmation hearing transcript June 27, 1951, p. 187). During this period from December 31, 1940 to July 1, 1946, no rate increases were granted, although the cost index factor increased approximately 50%. For the entire 10-year period 1941-1950 the System received overall freight rate increases of 59% (Confirmation hearing transcript June 27, 1951, p. 189)

as contrasted with an increase in the cost index factor of approximately 99%. There was thus a *complete lag* in the granting of increased rates during the first half of the period 1941-1950 and a serious overall lag in the last half of the period. The average rate per passenger per mile which was 3.09 cents in 1930 which decreased to 2.06 cents in 1935 and never again reached that figure until 1946 when it recovered to 2.15 cents, and then receded to 2.09 cents for 1948 and 1.99 cents for 1949 (Moody, Steam Railroads, 1940, p. 1636; 1950, p. 1084).

War Years Improperly Excluded from Consideration

26. The Commission excluded consideration of the System's earnings during the war years on the ground that they were extraordinary with little chance of repetition in peace times (D.C.R., p. 28553). This action was arbitrary because the only thing extraordinary about the earnings was that the large passenger revenue deficits in every year since 1929 turned into huge surpluses during the war years (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument). In 1944 this surplus amounted to $30,173,995 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument). This startling change was not the result of any passenger rate increases to compensate for increased costs, but was entirely due to the heavy demand for passenger service which fortunately the System was prepared to handle. The post-war period has brought a return of deficits in passenger revenue. In 1949 the deficit was $13,383,297 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument) and is not expected to be less than $10,000,000 in 1950 (Confirmation hearing transcript June 27, 1951, p. 155).

The freight revenue surplus during the war years was, therefore, not extraordinarily high if the relationship

between increased costs and rates then prevailing are properly evaluated. The extraordinary circumstance that, in a 20-year period, only the four war years showed a surplus from passenger revenue (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument), merely demonstrates how inadequate the freight rates were during these years, if the habitual losses from passenger traffic, which were incurred during most of the period, are substituted for the surpluses shown in the war years. The unique feature of the war years is the change in the habitual relationship between passenger and freight revenues and their respective contributions to the net earnings figures. For example, if the System passenger revenue loss anticipated to be about $10,000,000 for 1950 (Confirmation hearing transcript June 27, 1951, p. 155) is treated as an average for and is substituted for the passenger surplus revenue of $30,173,955 for 1944 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument), the net revenues from railway operations would be reduced from $133,549,100 (D.C.R., p. 28531) to $93,375,145. After making proper tax adjustments the income available for interest would be reduced to approximately $36,000,000. This computed figure was generated from traffic other than passenger traffic and was due entirely to the extraordinary volume of freight traffic. It does not reflect any passenger or freight rate adjustment to compensate for increased costs. For example, the MOP in 1944 carried a freight tonnage of 61,173,323 tons (P.R. III, pp. 31, 136-137, Commission Exhibit No. 969, pp. 1 and 2), the second largest in its history, as contrasted with 50,750,850 tons (Alleghany Confirmation Exhibit No. 37A, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206) in 1950. Similar computations for the other war years would produce relatively comparable results.

These computations conclusively demonstrate that not even the System's war earnings reflect the maximum

earning power of the System. For instance in 1950, when prevailing rates represented only a 59% increase (Confirmation hearing transcript June 27, 1951, p. 189) against a 99% increase in costs, when the System was sustaining the same passenger losses (Confirmation hearing transcript June 27, 1951, p. 155) assumed in making the above computations, when the volume of freight traffic was materially less, the System generated income available for interest, as adjusted for mail pay and cut-backs, in the amount of $41,103,581 (Confirmation hearing transcript, pp. 46, 307, 319, Group Confirmation Exhibit No. 1) as against the comparable 1944 figure, as above adjusted, of approximately $36,000,000.

Under conditions prevailing in 1950, subject to necessary tax adjustments, this 1944 freight surplus would amount to approximately $49,324,277, a 20% increase over 1950 earnings. From 1940 to the end of 1944 the cost index factor increased approximately 30%. If the System had been granted commensurate freight rate increases, this 1944 freight revenue surplus, subject to proper tax adjustments, would have amounted to approximately $46,800,000. In the interest of accuracy and fairness, however, it should be pointed out that the year 1944 presents the extreme example during the war years; but similar treatment of other war years would produce comparable results to a lesser degree.

In discarding the war years, the Commission not only overlooked their vital significance as evidence of the System's capacity operating under equitable freight rates, to increase its surplus from freight revenue in an expanding economy; but also completely disregarded their significance in demonstrating the extent to which the railroads are required to maintain passenger facilities to meet the Nation's necessities in normal as well as in crisis periods, and the extent to which the preparation for and the

rendering of this service affects the overall earning capacity of the System under a weighted average of normal and crisis conditions. The Commission, therefore, erred in discarding the war years, as factors, in determining the earning capacity of the System and fixing an inadequate capitalization.

If the System's earning capacity and its maximum capitalization are to be fixed on the assumption that it must continue passenger service after reorganization, the security holders as a minimum have a constitutional right to demand that the Commission consider, (a) the average weighted value of passenger revenue surplus in times of crises as well as deficits in normal times, (b) the effect increasing passenger rates commensurate with the rise in the cost index factor would have in decreasing deficits and increasing overall earnings, (c) the effect of promptly granting rate increases for other services equal to or even in excess of increasing costs, to compensate for passenger deficits, provided they cannot be eliminated by higher passenger rates. None of these matters has been considered and weighed by the Commission and until the earning statistics are thus evalued, they are worthless as a measure of the System's earning capacity.

Questions Presented

1. Were the findings and conclusions of the Commission as to the exclusion of the MOP common stock from participation in the reorganized company and as to the permissible maximum capitalization, the physical valuation and the earning capacity of the MOP System for reorganization purposes, supported by material evidence and reached by the application of proper statutory and Constitutional standards?

2. If it is established by undisputed evidence, in a reorganization proceeding under Section 77, that a bank-

rupt railroad over an extended period of time has not been and is not now being afforded an opportunity to earn a reasonable return on the reproduction cost, less depreciation, of its property devoted to the public use, because of the Commission's failure to grant rate increases reasonably commensurate with increases in construction costs and general prices during such period, may the Commission, for the purpose of determining its permissible maximum capitalization as reorganized and the extent of its security holders participation therein, limit its findings as to the railroad's earning capacity to an amount materially less than a reasonable return on the reproduction cost less depreciation, of its property devoted to the public use during such period, without violating the statutory and legal standards of Section 77 and the Fifth Amendment to the Constitution?

3. Did the Commission, in approving a consolidation, under Section 77 of the parent MOP and its subsidiary Gulf Coast Lines, apply proper statutory and Constitutional standards in limiting the maximum capitalization of the parent to an amount measured by its earnings, and of the subsidiary to an amount measured by its physical value, to reduce the overall consolidated capitalization and exclude the MOP common stock from any participation?

Reasons Relied on for the Allowance of the Writ

I. Reasons Why All Relevant Evidence Should Be Reviewed to Determine Whether the Conclusions of the Commission Were Supported by Material Evidence in Accordance with Statutory Standards.

It is believed that the Commission and the reviewing courts have defined and applied the term "material evidence" in connection with Section 77 contrary to applicable decisions of this Court. In any event this

Court should define the characteristics of the term as applied to Section 77, as it involves an important question of Federal law.

The evidence relied upon to support the Commission's conclusions as to the physical value and earning capacity of the System, which in turn were relied upon to support its conclusion as to the permissible maximum capitalization, was not material evidence under statutory standards or the standards applied in equity proceedings, because the conclusions reached were unreasonable and illogical when the facts relied upon to support them are tested by *"due consideration"** of *"all other relevant facts".** The findings of the Commission as to physical value and earning capacity do not purport to be and are not findings of fact. Relevant facts are not synonymous with material facts. The facts in support of the conclusions may be relevant in the sense of being admissible in evidence, but under the statutory standards they must be tested by "due consideration"* of "all other relevant facts"* to determine whether, after being so weighed and evalued, the conclusions reached are reasonable and logical. Conclusions based on a "due consideration"* of all relevant facts require a mental weighing and balancing of the facts in an appropriate or legal manner in order to reach reasonable and logical conclusions. If, after such a test of all the facts relevant to the issue, the conclusions are unreasonable or illogical, the particular facts relied upon to support the conclusions are not material under the statutory standards of Section 77 or the usual standards applied in equity proceedings.

The wording of subsections (b) and (e) of Section 77 of the Bankruptcy Act irrefutably support this analysis of the characteristics of material evidence necessary to support the conclusions reached. Subsection (b) requires

* Section 77(e) of the Bankruptcy Act.

"*due consideration* of the probable prospective earnings of the property in the light of its earning experience and all other relevant facts." (Italics added.) Almost identical phrasing is used in subsection (e). Subsection (c)(11) lends additional support by providing that reports of the Commission's agencies "shall be prima facie evidence of the facts therein stated" which implicitly requires a weighing and balancing of the evidential value of such a report and any evidence in rebuttal thereof in order to reach a reasonable and logical conclusion.

It is not believed that this Court intended to otherwise characterize material evidence in the following quotation from *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, page 473:

> "Congress apparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards."

In view of the fact, however, that Section 77, unlike subsequent legislation regulating the procedure of administrative agencies, failed to characterize the evidence which would sustain the conclusions of the Commission, the public and the security holders of the System and railroads in general are entitled to have this Court define the characteristics of material evidence by determining the extent the evidence in this case will reasonably and logically sustain the findings and conclusions of the Commission.

Space will not permit of a detailed analysis of all the vital evidence hereinbefore set forth in the Summary

Statement (hereinafter referred to as "S.S."). A few examples will suffice to establish that the Commission's conclusions were not supported by material evidence.

Physical Valuation Evidence

The Commission, in reaching its conclusions as to the physical value of the System, relied entirely upon the Report (P.R. III, pp. 448-512) of its Bureau of Valuation on the elements of value of the System as of December 31, 1945 (D.C.R., pp. 28510-28513; S.S. Par. 10). This report is, at best, only prima facie evidence. It is not a compilation or simple computation of facts as of December 31, 1945. It merely represents the opinion or, more accurately, the guess of the individual or individuals in the Bureau, who prepared it for the occasion, as to values they expect to prevail at some indefinite period in the future (P.R. III, pp. 468-469). The individuals who prepared the report were neither identified nor qualified on the witness stand as experts capable of analyzing or expressing an authoritative opinion on national and world economic and political conditions which are exerting and will continue to exert such a profound influence on values (P.R. III, pp. 511-512).

To be weighed and balanced to determine whether this prima facie evidence has the statutory characteristics of material evidence is the following evidence:

(a) The Railroad Construction Indices, which are purely mathematical compilations of fact, establish as a fact (1) that the overall valuation of the System as of 12/31/46 was in fact $801,203,139 as contrasted with the Commission's comparable valuation of $639,463,285 (S.S. Par. 10), (2) that the overall valuation of the System as of 12/31/50, would amount to $1,094,128,515, if properly computed on the Commission's formula adopted in Ex Parte 175 (S.S. Par. 11), (3) that the above valuation of $1,094,128,515

would have to be increased to $1,213,921,751, if the computations were actually based on the index cost factor of 284 prevailing in 1950 (S.S. Par. 8), (4) that the Commission's 1946 valuation applied in 1950 would result in a complete disregard of all increased cost factors after 1935, except to the extent recorded in the net additions and betterments, as is demonstrated by the fact that its 1935 valuation figures plus the net additions and betterments from 12/31/35 to 12/31/50 exceed the Commission's 1946 valuation by $58,905,956 (S.S. Pars. 9, 12).

(b) The enormous improvement in the condition and earning power of the System's properties due to the very large expenditures for additions and betterments and maintenance (S.S. Par. 12 (d)), particularly the expenditures for dieselization which, it is estimated, will produce an annual saving of $13,304,700 (S.S. Par. 12(d)).

(c) The factual and expert opinion testimony of one of the nation's most noted economists as to the permanent nature of prevailing non-agricultural prices and of the national growth trend which he predicted would not be interrupted for 20 or 30 years by a depression comparable to the era of the nineteen-thirties (S.S. Par. 12(e)).

Evidence as to Earning Capacity

The Commission's conclusion as to the System's future earning capacity was based solely on the inadequate revision (S.S. Par. 22) of the so-called "Normal Year" forecast, which even failed to reflect the full earning potential of the depression formula employed (S.S. Par. 13).

To determine whether this evidence has the statutory characteristics of material evidence as above defined, it at least must be weighed and balanced in connection with the following circumstances and facts:

(a) The reduction by the Commission of the revised "Normal Year" forecast to the extent of $1,172,781 with-

out a scintilla of evidence to support such a reduction of an already inadequate revised estimate (S.S. Par. 22).

(b) Mr. Perkins' opinion that 1930 and 1931 were approximately normal years and that there will be a steady growth in traffic after a normal year is reached (S.S. Par. 13).

(c) The earning statistics showing an increase of System earnings available for fixed charges from a low of $5,998,523 in 1935 to a peak of $66,205,617 during the war years and a top of $45,595,589 (booked) during the post war period (S.S. Pars. 13, 14).

(d) The unanticipated increase in the earning potential of the System due to the favorable shift in the "Commodity Consist" of the freight traffic handled by the System since 1935 when the "Normal Year" forecast was under preparation (S.S. Pars. 15, 16, 17) which earnings potential was given no weight by the Commission (S.S. Pars. 15, 16).

(e) The vast improvement in the economic condition of the country as a whole and the region served by the System since the depression years, typified by an increase in the gross national product from $72,193,000,000 in 1935 to $279,800,000,000 in 1950 (S.S. Par. 20), and by the steadily increasing rate at which old industries in the System's territory have expanded and new industries have been established (S.S. Par. 21).

(f) The factual and expert testimony of Dr. Theodore Yntema as to existing and future industrial economic and political factors which will prevent severe depressions in the future and insure a permanently expanding economy (S.S. Par. 19).

(g) The factual testimony that the System has not been afforded an opportunity, even in the war years, to demonstrate the extent it could earn more than a reasonable

return on the fair value of its physical property devoted to the public use, due to the inadequate adjustment of freight and passenger rates to rising costs (S.S. Pars. 25, 26), and the habitual losses incurred in furnishing necessary passenger service, except during the war years when the extraordinary volume of passenger traffic produced a surplus and obscured the inadequacy of the passenger and freight rates during this period (S.S. Par. 26).

The fundamental facts in the case are not in dispute. *The Commission's findings as to the System's physical value and earning capacity are conclusions.* These conclusions were, in turn, based on the conclusions of its Bureau of Valuation as to the System's normal year valuation and the completely discredited conclusions of the "Normal Year" earnings forecast. To the extent such conclusions are supported by any factual testimony, such facts must be tested by a "due consideration"* of "all other relevant facts"* to determine whether the conclusions reached and the results that flow from their application are reasonable and logical. If thus properly weighed and evalued, it is submitted that neither the materiality of the evidence relied upon nor the conclusions reached conform with the statutory standards or the standards imposed by Courts of Equity.

The undisputed factual background of this case makes the following quotation from *Irving Bank-Columbia Trust Co.* v. *Stoddard*, 292 F. 815, 821, particularly pertinent:

> "It is true that an equity court, taking charge of a receivership, should have great deference paid to its decision on a question of disputed facts, where the court has the opportunity to see the parties interested and their witnesses; but here there is no controversy on facts, and an appellate court is able to come to a sound conclusion as competently as the District Court."

* Section 77(e) of the Bankruptcy Act.

The following quotation from *New York Life Ins. Co.* v. *Simons*, 60 F. (2d) 30, 32, indicates that Appellate Courts in equity are not precluded from reviewing all the facts if the conclusions reached are unreasonable:

> "For an appellate court to hold that a finding of fact by a sitting justice in an equity case is clearly wrong, it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the imprints of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found."

Since Section 77 imposes a duty on the Commission to weigh and evalue all relevant testimony to arrive at reasonable and logical conclusions and merely provides for judicial review without any restrictions, the courts of review are not merely permitted to review but are under a duty to review all relevant evidence to determine to what extent the Commission's findings are reasonable.

It is submitted that the reviewing courts made no such evaluation of all the relevant facts as is required by the legal standards of Section 77. That both the Commission and the reviewing courts in reality disregarded all the evidence introduced after its Original Report, dated January 10, 1940, is best evidenced by the small amount the System's capitalization was increased in its Fourth and Fifth Supplemental Reports, dated respectively August 2, 1949 and December 29, 1949.

If verbiage must give way to reality and substance, the Commission's action in increasing the capitalization of the System from $560,000,000 in its Original Report to $612,000,000 in its Fourth and Fifth Supplemental Reports,

merely amounts to capitalizing the "Normal Year" earnings forecast at a 3.6% rate in its Fourth and Fifth Supplemental Reports instead of the 3.9% rate used in its Original Report. This is the mere recognition of the lower composite yield on Railroad bonds prevailing during 1949, and leads inexorably to the absurd conclusion that the System's "*earning capacity*" is limited to the "Normal Year" earnings estimate.

Nothing more clearly demonstrates the degree to which the Commission and the reviewing courts departed from the statutory standards in weighing and evaluing all the relevant testimony, and reaching the conclusion that the MOP common stock should be eliminated from participation due to the maximum capitalization fixed.

II. Reasons for Reviewing the Commission's Conclusions as to the Earning Power of the System Upon Which It Based Its Maximum Capitalization for Reorganization Purposes.

The Commission and the reviewing courts decided this question contrary to applicable decisions of this Court. The Commission in its 1944 Report (257 I.C.C. 479, 522), which was decided after the decision of this Court in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, adopted its earlier statement in *Chicago G.W.R. Co. Reorganization, 247 I.C.C. 193, 195* as establishing the proper legal criteria for determining the earning power of a railroad and its permissible maximum capitalization. The legal formula there stated, is as follows:

> "The value of railroad properties which we endeavor to determine within maximum limits for financial reorganization purposes is value in the strict economic meaning of that word. Briefly, it may be described as the actual worth of the properties to their owners, and basically it is dependent upon the present and prospective earning power of the prop-

erties, considering, among other things, the amount of business available, the competition which must be met in obtaining that business, and the character and condition of the facilities which make up the physical properties.

"For purposes of public regulation of rates and charges, the word value has come to be used, under the decisions of the United States Supreme Court, in another sense, known variously as 'fair value,' 'value for rate-making purposes,' and sometimes as the 'rate base.' It is the amount upon which the owners of the property are entitled, under the Constitution to an opportunity to earn a reasonable return, an opportunity of which they cannot be deprived by public regulation if confiscation is to be avoided. This amount is determined after giving consideration and weight principally to the original cost of the properties, the cost of reproduction of the portion capable of reproduction, the present value of land, and the extent to which the properties have depreciated.

"This latter so-called value may obviously, and ordinarily will, differ from value in the strict economic meaning of the word. Because of sparsity of business available or the competition of other carriers, for example, it may not be possible to earn a reasonable return upon 'value for rate-making purposes,' even if public regulation allows the carrier a free hand in the making of its rates and charges. In that event the economic value will be the lower of the two. On the other hand it may be the higher, if the carrier is so strategically located that it can earn more than a minimum reasonable return upon 'value for rate-making purposes' under public regulation, which must to some extent be based upon general transportation conditions."

The Commission in its Fourth and Fifth Supplemental Reports and the reviewing courts, in approving such reports, departed from the above standards.

The following quotation from *Bluefield Water Works & Improvement Company* v. *Public Service Commission,* 262 U. S. 679, 692, cited with approval in *United Railways & Electric Company* v. *West,* 280 U. S. 234, 250, establishes the legal and constitutional standard for fixing the rate and rate base of a public utility.

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; * * *"

This formula should be applied to the reproduction cost, less depreciation, of the property devoted to the public use. In this connection Dr. Yntema testified that in unregulated industries in which the volume of business is not declining, economic values tend to approximate reproduction costs (P.R. III, p. 166) and that, unless the railroads of the country are a dying industry, they can earn a reasonable return upon such reproduction costs (P.R. III, p. 163). That such reproduction cost is not excessive as a rate base for the System is established by the fact that the System's asset value as of December 31, 1950 was $936,235,940 (Alleghany Confirmation Exhibit No. 5) as against a reproduction cost, less depreciation, of $1,094,128,515, computed by applying the conservative formula used by the Commission in Ex Parte 175 (S.S. Par. 11).

Although railroads are a regulated industry, they are compelled to compete with unregulated industry for capital in order to survive and must be permitted to produce earnings commensurate with their economic value, which means that, subject to the relative risks involved, they

must be given an opportunity to produce earnings on the same basis as unregulated industry (P.R. III, p. 167). *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 692, 693.

Petitioner contends that the interpretation of the opinion of Mr. Justice Douglas in the *Milwaukee* case, 318 U. S. 523, 541, as to the meaning of Section 77(e), which was urged upon the District Court and adopted by it (P.R. III, pp. 922-923), is erroneous. The phrase in Section 77(e) "in the light of its earning power", as interpreted by Mr. Justice Douglas, can only mean that "earning power" as the *primary criterion* must be tested by a consideration of the value of the railroad's property devoted to the public use, to determine whether the maximum capitalization fixed for reorganization purposes reflects *that opportunity* to earn a reasonable return, guaranteed by the Constitution, on such value. If the earning record indicates that such an *opportunity* has not been afforded, the permissible maximum capitalization for reorganization purposes may not be fixed at less than the reproduction cost, less depreciation, until the earning power, tested by such opportunity, can be definitely shown to be insufficient to support such a capitalization. *The Fifth Amendment to the Constitution is a restriction on the Government, not on the citizen.* It was this restriction on the power of the Government with which Mr. Justice Douglas was concerned when he used the following parenthetical phrase, "(apart from doubts concerning constitutional power to disregard them)" and the following clause, "except as they may indirectly bear on earning capacity." In holding that Section 77 intended to make "earning power" the primary criterion for fixing capitalization for reorganization purposes, he meticulously pointed out that the Constitutional restrictions on the Government's power to appropriate the property of its citizens must be honored.

It is submitted that this Court did not hold that maximum capitalization for reorganization purposes must be measured by a railroad's earning record without regard to the value of its property devoted to the public use or by an "earning power" necessarily restricted to a reasonable return on the value of such property. On the contrary, it is submitted, that this Court held that such capitalization must be measured by an "earning power" that adequately reflects an opportunity to earn a reasonable return on such a property valuation and *may be measured* by an "earning power" reflecting a higher return, if there is no showing that a capitalization so measured would be contrary to the public interest.

In the Circuit Court it was also contended that the opinion of Mr. Justice Douglas in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, had the effect of relieving the Commission from the necessity of considering valuation data either in a rate case or in a reorganization proceeding under Section 77. Petitioner is not prepared to lightly accept forced interpretations of opinions of this Court, which would in any way impair the safeguards contained in the Fifth Amendment to the Constitution. In so far as the opinion has any bearing on a railroad rate proceeding controlled by different statutory standards, it provides for testing the end results of the "rate-making process" by the same fundamental factors adopted in the *Bluefield Water Works* case, *supra*. These factors are set forth in the following quotation from the opinion in the *Hope* case at page 603:

> "The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that 'regulation does not insure that the business shall produce net revenues.' 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial

integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276, 291 (Mr. Justice Brandeis concurring)."

As a matter of fact, valuation data was considered and rejected as not predicated on fact and as too "conjectural and illusory" (*Hope* case, p. 597) the court stating at page 605, "The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base." Thus all that Mr. Justice Douglas suggested by way of dictum at page 602, was that under the facts of the case the complaining party had the burden of showing, after the Commission had reached the end result, that the rate order was unjust and unreasonable in its consequences. Mr. Justice Reed, at page 623, so construed the suggestion. The opinions of Mr. Justice Jackson and Mr. Justice Frankfurter in searching for criteria to guide the Federal Power Commission in fixing "just and reasonable" rates in the case of public utilities faced with the problem of wasting assets, certainly did not suggest that the majority opinion requires the abandonment of the conventional criteria used in railway rate proceedings. (See pp. 627, 648; see also *Market Street R. Co.* v. *Commission,* 324 U. S. 548 at 567, 569.) In a railroad rate case the suggestion would

place a very onerous procedural burden on the complaining party but would not necessarily impair the constitutional rights of a party diligent in the protection of such rights. It certainly is not a repudiation of the doctrine set forth in the *Bluefield Water Works* case, *supra,* so essential for the protection of the citizen's constitutional rights.

The term "earning power" as used in Section 77(e) and as interpreted in the above opinions is not synonymous with the term "earning record". Because a railroad is a regulated public utility, a legal determination of its earning power and the value of its property must be predicated upon the assumption that the rates and other regulatory restrictions imposed are fair and just. The Commission thus has a duty to see that the railroad is not subjected to unjust rates or other regulatory restrictions which have the effect of denying to it an opportunity to earn, if it can, a reasonable return on its reproduction cost, less depreciation, or at least on the asset value of its properties devoted to the public use.

For reorganization purposes the measure of this opportunity must be tested by the "past, present and prospective" actions of the Commission. To avoid the predisposition of the Commission to sustain the propriety of the rates established by it from time to time and the validity of its interpretation of the railroad's earning record as the measure of its "earning power," it is imperative that the courts review the Commission's past actions in this respect and *independently determine whether the railroad's "earning record" is a fair estimate of its "earning power" "past, present and prospective".**

Whether Petitioner has the burden of proving that the rates established have produced unjust and unreasonable consequences, is immaterial, since Petitioner has sustained that burden. Petitioner has affirmatively proved by undisputed evidence that the rates established have not

* Section 77(e) of the Bankruptcy Act.

afforded the System an opportunity to earn on the average a reasonable return on the reproduction cost, less depreciation, of its property devoted to the public use or on even the book value of such property (S.S. Pars. 24, 25), although at times the earnings produced with inadequate rates show that the System has the facilities and capacity to earn a reasonable return on such a valuation of its property (S.S. Pars. 14, 26).

Petitioner has established by an analysis of all relevant evidence, that the Commission's conclusions as to the reproduction cost, less depreciation, of the System's properties and its earning power, upon which the Commission based the System's capitalization for reorganization purposes, do not accurately reflect the cost factors past, present or prospective or adequate rates in relation to such cost factors and are not supported by material evidence. (Reference is made to the discussion of Question 1.)

Specifically Petitioner has shown (a) that the failure to grant the System rate increases commensurate with the rise in the cost factors and prices generally between 12/31/40 and 12/31/50 seriously impaired the earning record of the System (S.S. Pars. 24, 25); (b) that the System's earnings record during the war years does not even reflect the maximum earning power of the System, because of the inadequacy of the rates under which it operated, and because of the unusual relationship then existing between freight and passenger traffic (S.S. Par. 26); (c) that the Commission in discarding consideration of the System's earnings record during the war years and in discounting the permanence of the post war earnings record, relied upon incomplete and distorted earnings statistics (S.S. Par. 26); and (d) that the Commission has made no attempt to compensate the System for the habitual losses incurred in rendering necessary passenger service by higher passenger rates or higher rates on other services (S.S. Pars. 24, 25).

This affirmative case, including all other relevant evidence, properly weighed and evaluated, requires the discarding of the Commission's conclusion as to the System's earning power, including the System's capitalization based thereon, because it fails to reflect that opportunity, past, present and prospective, for the System to earn a reasonable return on the value of its property devoted to the public use (based on either asset or reproduction cost, less depreciation), which is guaranteed by the Fifth Amendment to the Constitution, and sustained by the above decisions.

III. Reason for Reviewing the Inconsistent Standards Adopted by the Commission for Fixing the Capitalization of the Various Segments of the System.

The Commission and the reviewing courts decided this question contrary to applicable decisions of this Court. The discussion of the facts and conclusions with respect to Questions 1 and 2 apply in varying degrees to the Gulf Coast Lines as a separate segment of the System. The discussion need not be repeated here. It is sufficient to point out that any of the computations of reproduction cost, less depreciation, applied to the System (S.S. Pars. 10, 11), if applied to the Gulf Coast Lines will produce reproduction values sufficient to support a capitalization for the Gulf Coast Lines of approximately $12,500,000 to $34,500,000 in excess of the $83,700,000 permissible capitalization fixed by the Commission in its Fourth and Fifth Supplemental Reports (D.C.R., p. 28561). Therefore, the reproduction cost, less depreciation, of its properties are greatly in excess of an amount necessary to support a capitalization of its revised normal year earnings of $4,700,000 (D.C.R., p. 28545), as found by the Commission, at rates commensurate with those used by the Commission in capitalizing its normal year earnings for the System, *if this were required by the legal standards of Section 77.*

In this connection the District Court stated: "It is not a violation of the statute to regard reproduction cost new less depreciation as a maximum permissible capitalization" (P.R. III, p. 926). As pointed out at pages 41-42 this statement is erroneous, because it deprives the security holders of the Gulf Coast Lines of the right to have the value of their securities measured by its economic value.

The Commission capitalized its revised "Normal Year" earnings for the Gulf Coast Lines at 5.6%, for the MOP at 3.7% (P.R. III, p. 925) and for the System at 4.158%. The results produced are unreasonable and illogical as applied to the security holders of the Gulf Coast Lines, including the MOP.

Even if such conclusions were based on proper legal and statutory standards as applied to the reorganization of a single independent railroad, they nevertheless would be erroneous when applied to a reorganization which requires the consolidation of various profitable and less profitable subsidiary segments of a System. It is a departure from legal and statutory standards and unfair to the security holders, particularly the stockholders of the parent, to apply one formula to the profitable subsidiary so as to produce the smallest possible capital and another and different formula to the less profitable parent and subsidiaries to obtain an overall minimum capitalization for the consolidated system.

If the security holders of the MOP System and particularly the security holders of the parent are to be required to accept for their claims consolidated securities, they are entitled to insist that the Commission apply a consistent legal theory and formula which will balance in proper proportion the good and bad in each situation. Certainly, the System, which is not earning the fair return guaranteed it by the Constitution on the value of its properties devoted

to the public use, cannot be forced to discount the earnings of a profitable segment of its business when reproduction cost becomes the primary and paramount test and at the same time and in the same proceeding discount the reproduction cost of a less profitable segment when "earning capacity" becomes the test, under a forced consolidation for reorganization purposes. Such a double standard could not be used to establish the consolidated capitalization of private enterprises. It should not be used in a forced consolidation under Section 77 to fix the lowest possible consolidated capitalization of railroads and thereby exclude the MOP common stock from any participation. Such an application of double standards in the same proceeding does not comply with the legal statutory standards required by Section 77 and the Constitution.

Appraisal of Equity Premature

Petitioner recognizes that the extent of the value of the System's equity will depend upon a reappraisal of the case by the Commission after a correction of the errors pointed out. Any attempt to appraise this value at this time, therefore, would be premature.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket, "No. 14270, Alleghany Corporation, Holder of Common Stock of Missouri Pacific Railroad Company,

Debtor, Appellant, vs. Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, et al., Appellees," to the end that said cause may be reviewed and determined by this Court, that the judgment of said Court of Appeals entered August 14, 1951, be reversed and that Petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated: January 11, 1952.

Respectfully submitted,

ADRIAN L. FOLEY,
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14 Wall Street,
New York, N. Y.,
Attorneys for Petitioner.

APPENDIX A

Adjustment of 1950 Freight Revenues, Based on "Normal Year"
"Traffic Consist" or "Commodity Mix"
(Summary: Missouri Pacific System)

	Actual 1950 Freight Revenue	Adjusted 1950 Freight Revenue	Constructive Revenue Loss
Missouri Pacific Railroad	$198,275,958	$188,796,331	$9,479,627
Gulf Coast Lines	39,785,642	39,236,332	549,310
International-Great Northern	30,134,437	30,643,363	(gain) 508,926
Missouri Pacific System	$268,196,037	$258,676,026	$9,520,011

Adjustment of 1950 Freight Revenues, Based on "Normal Year"
"Traffic Consist" or "Commodity Mix"
(Gulf Coast Lines)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	62,719	$ 7,954,171	110,369	$126.82	$13,996,997
Animals	4,992	326,052	16,983	65.31	1,109,160
Mines	90,494	6,662,536	84,695	73.62	6,235,246
Forests	24,336	1,751,034	18,835	71.95	1,355,178
Mfrs. & Misc.	163,055	22,101,581	114,714	135.55	15,549,483
Total	345,596	$38,795,374	345,596		$38,246,064
L. C. L.	....	990,268	....		990,268
Grand Total	345,596	$39,785,642	345,596		$39,236,332

*"Normal Year" Forecast Distribution:

Agriculture	31.936%
Animals	4.914
Mines	24.507
Forests	5.450
Mfrs. & Misc.	33.193

**Calculated from Alleghany Confirmation Exhibit 37B

ased on "Normal Year"
odity Mix"
e System)

ctual 1950 reight evenue	Adjusted 1950 Freight Revenue	Con-structive Revenue Loss
,275,958	$188,796,331	$9,479,627
,785,642	39,236,332	549,310
,134,437	30,643,363	(gain) 508,926
,196,037	$258,676,026	$9,520,011

Adjustment of 1950 Freight Revenues, Based on "Normal Year" "Traffic Consist" or "Commodity Mix"

(Missouri Pacific Railroad)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	272,575	$ 34,761,304	368,535	$127.53	$ 46,999,269
Animals	59,092	6,389,068	109,392	108.12	11,827,463
Mines	336,361	29,124,581	328,808	86.80	28,540,534
Forests	136,448	13,216,754	207,320	96.86	20,081,015
Mfrs. & Misc.	665,255	106,125,637	455,676	159.52	72,689,436
Total	1,469,731	$189,617,344	1,469,731		$180,137,717
L. C. L.	....	8,658,614	....		8,658,614
Grand Total	1,469,731	$198,275,958	1,469,731		$188,796,331

*"Normal Year" Forecast Distribution:

Agriculture	25.075%
Animals	7.443
Mines	22.372
Forests	14.106
Mfrs. & Misc.	31.004

**Calculated from Alleghany Confirmation Exhibit 37A

ased on "Normal Year"
odity Mix"
)

t on	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
71	110,369	$126.82	$13,996,997
52	16,983	65.31	1,109,160
36	84,695	73.62	6,235,246
04	18,835	71.95	1,355,178
81	114,714	135.55	15,549,483
74	345,596		$38,246,064
68	....		990,268
42	345,596		$39,236,332

re 31.936%
..... 4.914
..... 24.507
..... 5.450
Misc. 33.193

37B

Adjustment of 1950 Freight Revenues, Based on "Normal Year" "Traffic Consist" or "Commodity Mix"

(International-Great Northern)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	57,864	$ 5,175,183	82,749	$ 89.44	$ 7,401,071
Animals	8,451	703,712	19,031	83.27	1,584,711
Mines	62,238	4,671,065	40,697	75.05	3,054,310
Forests	21,083	1,193,437	10,504	56.61	594,631
Mfrs. & Misc.	151,246	17,305,232	147,901	114.42	16,922,832
Total	300,882	$29,048,629	300,882		$29,557,555
L. C. L.	....	1,085,808			1,085,808
Grand Total	300,882	$30,134,437			$30,643,363

*"Normal Year" Forecast Distribution:

Agriculture	27.502%
Animals	6.325
Mines	13.526
Forests	3.491
Mfrs. & Misc.	49.156

**Calculated from Alleghany Confirmation Exhibit 37C

APPENDIX B

Comparison of "Normal Year" Statistics With Significant Periods In Reorganization Proceedings

Periods	No. Cars	Average Per Car	Freight Revenue	Income Available for Interest	
				Separate Cos.	System
Missouri Pacific Railroad Company et al.					
Average (1928–34)	1,109,956	$ 67.75	$ 75,199,265	$17,730,306	$21,206,172
1930	1,334,904	$ 67.80	$ 90,515,711	$24,742,258	$28,217,274
1931	1,079,518	$ 67.15	$ 72,491,510	$19,503,517	$23,321,317
Average (1930–31)	1,207,211	$ 67.47	$ 81,503,610	$22,122,887	$25,769,295
"Normal Year" Forecast	1,240,820	$ 64.50	$ 80,030,164	$16,886,318(1)	$20,412,204(1)
1939	947,350	$ 69.77	$ 66,100,673	$ 7,762,725	$10,097,423
1940	1,003,456	$ 69.09	$ 69,327,677	$11,276,729	$13,495,717
1950	1,469,731	$121.55	$178,659,336(3)	$35,928,237(2)	$45,595,589(2)
1950 % of (1928–34) average ..	132.41%	179.40%	237.58%	202.63%	215.01%
1950 % of (1930–31) average ..	121.74%	180.15%	219.20%	162.40%	176.93%
1950 % of 1939	155.14%	174.21%	270.28%	462.83%	451.55%
1950 % of "Normal Year"	118.44%	188.44%	223.23%	212.76%	223.37%
Gulf Coast Lines and Subsidiaries, Excluding I.G.N.					
Average (1928–34)			$ 11,330,573	$ 2,024,422	$21,206,172
1930			$ 15,203,748	$ 3,474,985	$28,217,274
1931			$ 11,576,712	$ 1,512,654	$23,321,317
Average (1930–31)			$ 13,390,230	$ 2,493,819	$25,769,295
"Normal Year" Forecast	187,847	$ 60.61	$ 11,386,310	$ 2,106,532(1)	$20,412,204(1)
1939	192,083	$ 67.77	$ 13,017,191	$ 2,559,256	$10,097,423
1940	191,017	$ 66.54	$ 12,710,339	$ 2,268,633	$13,495,717
1950	345,596	$107.94	$ 37,306,533(3)	$ 5,494,152(2)	$45,595,589(2)
1950 % of (1928–34) average ..			329.25%	271.39%	215.01%
1950 % of (1930–31) average ..			278.61%	220.31%	176.93%
1950 % of 1939	179.92%	159.27%	286.59%	214.67%	451.55%
1950 % of "Normal Year"	183.97%	178.08%	327.64%	260.81%	223.37%
International—Great Northern Railroad Co. et al.					
Average (1928–34)	204,178	$ 55.56	$ 11,365,227	$ 1,707,074	$21,206,172
1930	185,024	$ 58.09	$ 10,747,333	$ 1,122,435	$28,217,274
1931	252,315	$ 57.55	$ 14,519,911	$ 2,486,750	$23,321,317
Average (1930–31)	218,669	$ 57.82	$ 12,633,627	$ 1,804,592	$25,769,295
"Normal Year" Forecast	200,905	$ 53.41	$ 10,730,347	$ 1,419,354(1)	$20,412,204(1)
1939	157,867	$ 54.29	$ 8,570,137	$ 169,680 Red	$10,097,423
1940	162,561	$ 52.02	$ 8,456,029	$ 6,964 Red	$13,495,717
1950	300,882	$ 92.78	$ 27,918,026(3)	$ 4,258,700	$45,595,589
1950 % of (1928–34) average ..	147.36%	166.99%	245.64%	249.47%	215.01%
1950 % of (1930–31) average ..	137.59%	160.46%	220.98%	235.99%	176.93%
1950 % of 1939	190.59%	170.89%	325.75%	%	451.95%
1950 % of "Normal Year"	149.76%	173.71%	260.17%	300.04%	223.37%

(1) Before a total adjustment of $1,646,848 due to accounting adjustments not involving Perkins traffic and revenue estimates, making total System "Normal Year" $22,059,052 (Fourth Supplemental Report; District Court Record p. 28533; 239 I.C.C. 7 at 34-35, 91-92; Johnson Exhibit 242, 1936 Commission Proceedings).

(2) Before readjustments for mail pay, cut-backs, etc., referred to herein.

(3) Figures for freight revenue, number of cars and revenue per car were obtained from Commission Exhibit 969, except that the "Normal Year" figures were obtained from Commission Exhibits 242, 243, 244, 245, 246, 247 and 248 and 1950 figures were obtained from Group Confirmation Exhibits 2, 3 and 4. None of the figures include LCL freight.

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FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 525.

ALLEGHANY CORPORATION,

Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
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Dated: New York, N. Y., February 7, 1952.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Missouri Pacific Railroad Company Reorganization, 275 I. C. C. 59, 203 (1949)

Reconstruction Finance Corporation v. *Denver & Rio Grande Western Railroad Co.*, 328 U. S. 495, 509 (1946)

State of Texas v. *Group of Institutional Investors etc.*, 191 F. 2d 265 (8 Cir. 1951) cert. denied, ... U. S. ..... (October Term 1951, No. 416)

Texas & New Orleans Railroad Company v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 558 (1930)

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

1951 R. = The printed record filed in said United States Court of Appeals in Causes Nos. 14,264-14,274.

Texas R. = The printed record filed in said Court of Appeals in Cause No. 14,256.

1946 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

1941 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 525.

ALLEGHANY CORPORATION,

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against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8 Cir. 1951).

The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

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* A list of abbreviations and references used in this brief is on page iii, *supra*.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Question Presented.

This Petition for Writ of Certiorari is one of five* now pending before this Court requesting a review of the decision of the United States Court of Appeals for the Eighth Circuit affirming the approval of the Plan of Reorganization of the Missouri Pacific Railroad System. Certiorari has already been denied in No. 415, *James B. Morris, et al.* v. *Group of Institutional Investors, et al.*, and in No. 416, *State of Texas* v. *Group of Institutional Investors etc.* The question raised by this petition is:

> Whether the District Court performed the duties imposed upon it by Section 77(e) of the Bankruptcy Act, 11 U.S.C. §205(e), when it approved the Plan of Reorganization for the Missouri Pacific Railroad System certified to it by the Interstate Commerce Commission.

While this brief is specifically addressed to the Petition of Alleghany Corporation (No. 525), respondent will not repeat its argument on the above question in its other briefs, and respectfully requests this Court to consider the argument herein in connection with the other petitions for writ of certiorari which present this question.

Statement.

The history of these proceedings is set forth in paragraphs 1-6 of Petitioner's "Summary Statement" (Petition, pp. 3-6).

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* October Term 1951, Nos. 524-528.

In fixing a maximum capitalization of $612,000,000 for the System the Commission said (D. R. 28553):

> "There have been stated herein the elements of physical value of the debtors as determined by our Bureau of Valuation, their assets and liabilities as reported by their trustee, the record of their earnings, and the book and estimated values of their investments in affiliated companies and 'other investments.' All of these elements are important to consider in determining a permissible capitalization for the reorganized company. *The greatest weight should be given to the past and prospective earnings of the system in order that ample coverage of fixed interest may be assured in years of relatively lean earnings, and all interest as well as a return to stockholders be reasonably assured in more favorable years.* In considering past earnings the record of the debtor over a considerable period is more convincing of future performance than for a few years when special conditions may temporarily inflate or depress its operating results. As we have heretofore stated, the abnormal earnings of the war years cannot be considered as a criterion of the earnings which may be expected to be realized in the future so far as can be foreseen at the present time." [Emphasis supplied]

The Commission found that the total of annual interest and dividend requirements will amount to approximately 4½% of the new capitalization (D. R. 28554), and that:

> "Upon such basis, a capitalization of the average annual system earnings of $15,455,508 for the 5-year period 1937-1941 immediately preceding the entry of the United States into the world war produces $343,455,733, a capitalization of the average annual earnings of $42,854,927 for the period 1942-1948, which includes the extraordinary earnings of the

> war years, produces $952,331,711, a similar capitalization of the average annual system earnings of $31,438,502 for the 12-year period, 1937-1948, results in $698,633,378, and a capitalization of the trustee's normal-year forecast of $25,450,000, as herein adjusted, amounts to $565,555,555. Capitalization of the average of $34,656,736 for the 3 postwar years, 1946-1948, produces $770,149,688'' (D.R. 28554).

The Commission found that "upon a consideration of the entire record, including past, current, and estimated future earnings, the evidence of economic experts as to the future business prospects of the United States generally and of the Missouri Pacific territory specifically, and of other pertinent factors, . . . that a reasonable future normal year's earnings available for payment of interest after income taxes, will, so far as can be foreseen at this time, approximate $19,000,000 for the Missouri Pacific, $4,700,000 for the New Orleans, $1,750,000 for the International, and $25,450,000 for the system" (D. R. 28545). The factors which the Commission took into account in determining a future normal year's earnings are stated in its Fourth Supplemental Report at D. R. 28526-546. In its Fifth Supplemental Report the Commission pointed out that (D. R. 28655):

> "* * * our determinations of a normal year's earnings for each of the three principal debtors and for the system are not the result of mere additions of prospective earnings from citrous and chemical traffic to the trustee's normal-year forecasts. We considered many other factors as indicated in our report, including the general industrial growth of the communities served, the improvements made to the physical properties of the debtors which have resulted in more economical operation, etc., as well as certain adverse factors, which we enumerated."

In determining the new capital structure the Commission found that within the System capitalization of $612,000,000 the securities to be issued were of such kind and amounts "as to insure coverage of fixed interest in years of least favorable earnings and ample coverage of all interest charges together with a fair return to stockholders during periods of good earnings" (D. R. 28564). Thus, in any year when earnings of $25,450,000 should be realized, and before deductions for sinking fund payments, these earnings would cover the fixed and contingent interest, the dividend on the preferred stock, and most of the dividend on the class A common stock, although there would be nothing for the class B common stock (D. R. 28566).

Argument.

Alleghany's case rests on the proposition that the Commission and the Courts below gave too much weight to the depression years and not enough weight to the inflationary years in determining the maximum capitalization for the Missouri Pacific System. This Court is asked in effect, to examine *de novo* the twelve volumes of the record and the more than 1,000 exhibits that have accumulated in the 18-year history of this reorganization proceeding, and to reach conclusions contrary to those of the Commission and the two Courts below. Again and again this Court has said it will not conduct such a re-examination "in the absence of a very exceptional showing of error." See *Comstock* v. *Group of Institutional Investors etc.*, 335 U. S. 211, 214 (1948); *United States* v. *O'Donnell*, 303 U. S. 501, 508 (1938); *Texas & New Orleans Railroad Company* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 558 (1930).

The Commission's conclusion that the maximum capitalization for the System should not exceed $612,000,000 is supported by material evidence and was reached by the application of the proper statutory standards. The District Court carefully performed the function required of it by the Statute as construed by this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943) and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523 (1943). There is no important question of Federal law requiring decision by this Court, but only a question of the Commission's judgment. As this Court said in *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596-97 (1951), this "is actually only a dispute as to the proper inferences to be drawn from the evidence in the record; in effect, it is an invitation for us to try the case *de novo*. This Court must decline such an invitation . . ."

I.

In approving the plan of reorganization the District Court correctly performed the function assigned to it by Section 77.

After the decisions by the Court in the *Milwaukee* and *Western Pacific* cases *(supra)*, the original Plan for the reorganization of the Missouri Pacific System was returned by the Court of Appeals to the District Court to determine whether "in view of changed conditions and the decisions of the Supreme Court under date of March 15, 1943, in the cases involving the reorganization of the Western Pacific and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company," the Plan should be referred back to the Interstate Commerce Commission for further consideration (1946

R. 48), and the District Court referred it back to the Commission (1946 R. 126-27).

In approving the present Plan, the District Court found that the Commission's determination of value and capitalization had been reached in accordance with legal standards and was supported by material evidence. Petitioner's contention appears to be that there is other evidence in the record from which different conclusions might have been drawn. But it would have been a clear violation of the limited role assigned to the District Court, with respect to valuation and capitalization, for it to reject the findings by the Commission based upon 63 pages of detailed discussion of the elements considered in arriving at the new capitalization (D. R. 28501-564).

The Plan is not, as Petitioner suggests, based on a return to the conditions which existed in the railroad industry in the depths of the depression. The System earnings available for payment of interest from 1932 to 1940 were as follows:*

Year	Earnings Available for Interest
1932	$11,322,497
1933	10,178,938
1934	10,135,163
1935	5,998,523
1936	14,152,964
1937	15,456,122
1938	7,621,035
1939	10,097,423
1940	13,495,717

* Figures for the years 1932 to 1936 are in the Commission's Original Report, 1941 R. 333; 239 I. C. C. 33. Figures for the years 1937 to 1940 are in the Commission's Fourth Supplemental Report, D. R. 28542.

Thus the Commission's forecast for a future normal year's earnings is at least $14,000,000 higher than the average earnings during those depression years, and $10,000,000 higher than in any of those years.

Unlike the Petitioner, the Commission noted "certain adverse factors" (D. R. 28655) which might affect the System's earning power. Among these are "the constantly increasing cost factor as related to increasing traffic volume" (D. R. 28545), and the tendency of "traffic volume and revenue to decrease in a greater degree proportionately than will expenses" in the event of an industrial contraction (D. R. 28542).

Certainly, there was no basis for the District Court to upset the maximum capitalization arrived at by the Commission after considering all these factors.* Indeed, this very Petitioner joined in sponsoring a plan before the Commission which provided a capitalization of $619,000,000 for the System, only $7,000,000 more than the amount finally approved by the Commission (D. R. 28480, 28483; 1951 R. 184).

Petitioner attacks the Commission's capitalization of the New Orleans considered as a separate entity (Petition, pp. 46-49). The determination of separate capitalizations for each of the three principal Debtors was solely for the purpose of allocation of new securities to their respective

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* Petitioner repeatedly refers to events that have occurred since the approval of the Plan of Reorganization and which are not included in this record. The Interstate Commerce Commission, acting under 11 U. S. C. §208(a)(1) is now considering whether any "changes, facts and developments" have occurred since the approval of the Plan which were not provided for in the Plan and which make it necessary for the Commission to re-examine it. Respondent does not believe that any such changes have occurred, but it submits that the proper forum for determination of that question is the Interstate Commerce Commission and that this Court's action should be based on the evidence in the record before it.

security holders. The System capitalization was arrived at independently, and before any attempt was made to establish the separate capitalizations (D. R. 28556). As Petitioner does not participate at all in the reorganized company, the allocation of securities, and therefore the capitalization of the Debtors separately, is irrelevant to it.

II.

There is no conflict of decision.

In final analysis, Petitioner's complaint is that the capitalization of the System, as determined by the Commission, is not sufficient to leave any equity for the old common stock. But neither the Congress nor this Court has declared that the new capitalization of reorganized railroads shall be fixed in such amount as will enable all the old securities to participate. To the contrary, this Court has held "that the elimination of the claims of stockholders and creditors which are valueless from participation is in accordance with valid provisions of §77(e)." *Ecker* v. *Western Pacific Railroad Corp.*, 318 U. S. 448, 475-76 (1943). Indeed, this Court has said that if it is established that there is no "reasonable probability that the earning power of the road will be sufficient to pay prior claims of interest and principal and leave some surplus for the service of the stock" then "the inclusion of the stock would violate the full priority rule . . . incorporated in §77(e)(1)." *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 318 U. S. 515, 541-42 (1943); *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.*, 328 U. S. 495, 509 (1946).

In every reorganization there is usually a scaling down in amount of capitalization. In equity, the secured senior bondholders should suffer least; the most junior stockholders the most. As this Court said in the *Western Pacific* case, "senior bondholders first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything" (318 U. S. at p. 483).

Lastly, Petitioner claims that the Commission should have granted larger rate increases which would have produced larger earnings. The case now before this Court is not a rate making proceeding. The "question in a valuation for rate making is how much a utility will be allowed to earn. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn" (*Milwaukee* case, 318 U. S. at p. 540). No factual basis has been established as to whether higher rates would result in greater net revenue rather than divert traffic to other competitive transportation lines such as trucks, pipe lines and water carriers. In any event, this is not the proper forum to initiate questions on rate structure, the wisdom of furnishing necessary passenger service or operational problems generally.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: New York, N. Y., February 7, 1952.

Office - Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 525

ALLEGHANY CORPORATION,
Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ADRIAN L. FOLEY,
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Dated: March 4, 1952.

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IN THE

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No. 525

ALLEGHANY CORPORATION,
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GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Petitioner is entitled to a review at least as extensive and searching as that provided under the rule of *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474.

While the Institutional Group is unjustifiably charging your petitioner with seeking "to try the case de novo", it seeks to deny to the reviewing courts the right to determine whether the Commission's limitation of the capitalization was reasonable and logical in the light of the record in its entirety, including the body of evidence

opposed to the Commission's views,* on doubtful assumption that the expertness of the Commission renders its conclusion in this respect final. The *Camera Corporation* case, *supra*, decided seven years after the cases relied upon by the Institutional Group (Group Brief, p. 14), fully supports your petitioner's contention that the opinions in these cases were never intended to limit so drastically the reviewing power of the Courts.

In this connection the Court stated, in the *Camera Corporation* case, at page 490:

> "The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In appraising the significance of the *Camera Corporation* case, *supra* the Court in *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 Fed. 2d 786, 789 (C.C.A. 7th, 1951) said:

> "And we think the evidence supporting the conclusion may become even less substantial when it fails to persuade an experienced member of the Commission who dissents from its findings and conclusions."

It is submitted that the District Court and the Circuit Court of Appeals erroneously limited their review of the Commission's conclusions and findings in accordance with the contentions of the Group here and before such Courts.

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* *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474 (1951), Institutional Group Brief, pp. 13, 14, 15, 20, 21.

It is obvious that the District Court felt bound by the Commission's conclusions as to physical values based solely on the Bureau's report, which is merely *prima facie* evidence, and that it felt equally bound by the Commission's conclusions as to economic trends and changed conditions affecting earning power.* Furthermore the District Courts comparison of the 1946 and 1948 valuation data indicates that it mistakenly regarded the Bureau's 1946 valuation as having been computed on the actual 1946 cost index factors.** That the Circuit Court of Appeals felt absolutely bound by the Commission's finding as to reorganization value is shown by the following statement:

> "The action of the Commission in determining the reorganization value was taken in the field where its conclusions are binding." ***

There are no statements or intimations in the opinions of the District Court or the Circuit Court of Appeals that they gave any consideration to the dissenting opinions of Commissioner Alldredge, joined in by Commissioner Atchison, both able and long experienced as members of the Commission. Commissioner Alldredge in his dissent to the Fourth Supplemental Report said:

> "A study of the record in this proceeding indicates to my mind that the majority has been overly conservative in its estimate of future earnings of the Missouri Pacific system, particularly if weight is given to the substantial improvement in the main component of the system. This conservatism may be attributable to the fact that the conditions which have enabled favorable earnings to continue since

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* P. R. III, p. 922.

** P. R. III, p. 921.

*** P. R. V, p. 30; *State of Texas* v. *Group of Institutional Investors*, 191 Fed. 2d 265, 273.

> the close of the war have not yet had an opportunity to demonstrate clearly the extent and the permanency of the improvement over the disastrous prewar earnings record of this system. Any such forecast of future events necessarily is fraught with difficulties, but there are good reasons for believing that in the situation here presented future performance will be substantially better than the peacetime record of the past. The majority has given some recognition to this prospect but I believe it could have reasonably gone further." *

In his dissent to the Fifth Supplemental Report he suggests a provisional increase in the capitalization to meet the Congressional intent enacted in Section 77(b)(3) of the Bankruptcy Act.**

The inadequate review of these dissenting opinions and the significant facts opposed to the Commission's views discussed in the petition for writ of certiorari, requires a review by this Court to determine whether the Commission's limitation of the capitalization can conscientiously be sustained as reasonable and logical in the light of the entire record.

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* D.C.R., pp. 28033-28034.
** D.C.R., pp. 28685-28686.

II

A Statement that the Commission has considered the entire record is insufficient if the conclusions reached are not reasonable and logical.

A

Discounting of Neff's estimate of Income available for fixed charges due to increase in citrus and chemical traffic.

The Group argues that because the Commission asserted that its normal year's earnings "are not the result of mere additions of prospective earnings from citrus and traffic to the trustees normal-year forecasts", the Commission may properly disregard $1,172,731 of his estimate, although there is not a scintilla of evidence to show that his estimate was in error.* This is merely to argue that all the other earning potentials had declined between 1939 and 1948 to the extent of $1,172,731, which capitalized at 4½% amounts to slightly more than $26,000,000. The unreasonableness of such an assumption and argument is conclusively demonstrated by the important changes which have occurred since 1939. The record is devoid of evidence showing that the earning potential from all sources other than citrus and chemical traffic has thus declined since 1939. This is merely one example showing how important it is to examine the reasonableness of the Commission's conclusions based on its alleged consideration of the whole record. Since our petition contains a discussion of additional examples further consideration of the subject is unnecessary.

* Institutional Group Brief, p. 19

B

The Earning Statistics do not reflect the "Earning Power" of the System.

The Institutional Group's argument in the footnote at the bottom of page 19 of its brief has been anticipated in our petition for a writ of certiorari, pages 38-46. Nothing need be added except to observe that the Group's argument merely begs the question as to what extent the denial of fair rates requires the earning statistics to be increased for the purpose of fixing the maximum capitalization.

CONCLUSION

The petition of Alleghany Corporation should be granted.

March 4, 1952.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JAN 11 1952
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 526

MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS,
BONDHOLDERS PROTECTIVE COMMITTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY FIRST MORTGAGE,
EDMUND WRIGHT, et al.,
PROTECTIVE COMMITTEE FOR HOLDERS OF GENERAL MORTGAGE BONDS,
MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. .....

MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS,
BONDHOLDERS PROTECTIVE COMMITTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY FIRST MORTGAGE,
EDMUND WRIGHT, et al.,
PROTECTIVE COMMITTEE FOR HOLDERS OF GENERAL MORTGAGE BONDS,
MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals, for

the Eighth Circuit, to review the order and judgment of that Court rendered in the above cause, affirming the order, judgment, and decree of the District Court of the United States, for the Eastern District of Missouri.

JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254.

The date of the order and judgment of the Circuit Court of Appeals, for the Eighth Circuit, was August 14, 1951.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (R. 1033*) is reported in 93 F. Supp. 832. The opinion of the Circuit Court of Appeals is reported in 191 F. (2d) 265.

SUMMARY STATEMENT OF THE CASE.

This case involves the validity of procedures adopted by the Interstate Commerce Commission (hereinafter called the "Commission") in the promulgation by a majority of the Commission of a plan of reorganization Missouri Pacific Railroad Company (hereinafter called "MOP"), New Orleans, Texas & Mexico Railway Company (hereinafter called "NOTM") and International-Great Northern Railroad Company (hereinafter called "IGN") commonly referred to in these proceedings as the "principal debtors," and as respects NOTM and its subsidiaries, as "Gulf Coast Lines."

On March 31, 1933, MOP filed a petition for reorganization under Section 77 of the Bankruptcy Act and

* References to the transcript of the record are indicated by the letter "R." References to exhibits are indicated by the letters "Ex." Arabic numerals in all instances indicate pages.

caused its controlled and dominated subsidiary NOTM to do the same. Since then, NOTM has remedied all of its defaults as respects its publicly held obligations and for a number of years past has met all of its publicly held obligations currently and is in a position to continue to meet them as they mature.

Prior to bankruptcy, MOP supplied NOTM with funds, termed "advances" by MOP rather than capital investments. These so-called "advances" together with interest thereon constitute the inter-company indebtedness of NOTM to MOP which presently provides the sole basis for the inclusion of NOTM in the plan of reorganization of its parent MOP.

The plan of reorganization for the parent MOP required stockholders of NOTM to surrender their stock for securities of the new company on terms that an elementary mathematical calculation discloses results in the appropriation of millions of dollars belonging to NOTM stockholders.

The Commission places a value of $150 per share on NOTM based upon the development of a separation capitalization for NOTM. The capitalization serves no other purpose than fixing the value of NOTM stock as the plan does not contemplate the issuance of any NOTM securities.

The Commission relies upon its asserted power under Section 77 to order the assets of NOTM to be transferred to its parent MOP without observing the requirements, purposes and policies of Section 5 of the Transportation Act as required by Section 77 (f).

Petitioner contends that:

(a) The inter-company debt of the subsidiary NOTM to its parent MOP does not provide a valid basis for the inclusion of NOTM in the reorganization of its parent MOP.

(b) The proposed plan appropriates the property of NOTM stockholders for the benefit of others having no interest therein.

(c) The Commission has no right or authority to set up a capitalization of NOTM for the sole purpose of a sale of the property of NOTM to a particular private purchaser on terms dictated by the Commission while depriving pledgees of the right to reduce NOTM stock to possession.

(d) The Commission is without the power to effect the transfer of the assets of NOTM to its parent MOP without observing the requirements of Section 5 of the Transportation Act.

FACTS.

This petition is submitted on behalf of Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders' Committee, duly authorized by order of the Interstate Commerce Commission, in conformity with Section 77 (p) to solicit authorizations to represent bondholders. On the bankruptcy of MOP, $12,140,000 of these bonds were outstanding, secured by MOP's pledge of 121,460 shares, or approximately 82%, of NOTM's only class of capital stock. Since bankruptcy, in the years 1947 and 1949, the Bankruptcy Trustee acquired an aggregate of $1,715,000 principal face amount of these bonds at a discount of $1,373,-356.67 from the face amount of the claims represented by them, thus reducing the principal face amount presently outstanding in the hands of the public to $10,425,000.*

* Appendix D of the Plan reflects the first acquisition by the Bankruptcy Trustee but does not reflect the additional acquisition of $820,000 principal face amount acquired in 1949.

The Value of the NOTM Stock Pledged as Collateral for the Satisfaction of the Claim of the Secured Serial 5¼% Bonds.

As the Secured Serial 5¼% Bonds look primarily to their collateral for the satisfaction of their claim, its value is the crucial point in determining the treatment to which they are entitled in any plan of reorganization. As the collateral is capable of being liquidated, they enjoy a distinct advantage as compared with other secured creditors, such as the First and Refunding Mortgage 5% Bonds and the General Mortgage 4's, whose security cannot be similarly liquidated.**

While the right to reduce the collateral to possession is arrested by the filing of a petition for reorganization under Section 77, the exercise of this right would be the simplest way to conclusively determine its value.† Absent such right, we shall consider briefly the business criteria for appraising the value of the collateral.

(a) **Net Worth of NOTM:**

The simplest and most direct step toward the beginning of an appraisal of the value of the collateral from the standpoint of assets is to compute its value on the basis of the balance sheet.

Attached hereto, as Appendix A, are comparative Consolidated Balance Sheets of NOTM ("Gulf Coast Lines"), as of December 31, 1947, and December 31, 1950.‡ Tho

** At the date of bankruptcy, Reconstruction Finance Corporation, Railroad Credit Corporation and the Secured Bank creditors held obligations secured by collateral all of which have been paid off in cash in the course of the proceedings.

† Appellant has not sought in these proceedings to disturb the existing ownership by MOP of NOTM but contends that MOP having pledged the controlling interest in an extraordinarily profitable and strategic property for the satisfaction of its obligations to the Secured Serial 5¼% Bonds, they may not be required to surrender their collateral unless their claim is discharged in cash in full or they receive the full equivalent of cash.

‡ In both cases the surplus account is treated as were the similar items in the Consolidated Balance Sheets upon which this Court, in Comstock

former discloses a net worth as of that date of $24,786,542, giving a book value to NOTM stock of $167.10 per share. Corresponding figures on the latter date, disclose a net worth of $34,680,313, or a book value of $233.80 per share, an increase of $66.70 for the period.

A consideration of the figures set out above discloses that, independently of a value arising from "separate capitalization", the value of the assets represents a value per share for NOTM stock which, translated in terms of the aggregate value of the collateral securing the Secured Serial 5¼% Bonds, far exceeds the amount of their claim.

(b) **Capitalization of NOTM:**

The capitalization of NOTM is simple. Charges on the equipment obligations vary from year to year, depending upon the amount outstanding. Interest on the First Mortgage Bonds presently outstanding, which carry rates as high as 5½%, amounts to $2,080,145, and on the intercompany claim at contract rates, amounts to $583,087. After the provision for charges on the debt, and the determination of the amount payable on account of Federal Income and Excess Profit Taxes, all the remaining income belongs to the stockholders of NOTM and to no one else. With a very low share capital of only one class, the book value of each share is susceptible to very rapid increases which is reflected in a corresponding increase in the value of the collateral. This is demonstrated by the fact that the value of the collateral, measured by the book value,

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v. Institutional Investors (163 F. 2d 350), found the courts below were justified in relying, in determining the issues therein raised. If, as the Commission contends, in the Fifth Supplemental Report (R. pp. 28663/4), that $5,534,283 represents a "fictitious property value," it is only necessary to point out that this sum was included in the P. & L. Surplus in the years under review in the **Comstock** case, and was not transferred to a separate caption until after the District Court's decision in that case. If this Court was correct in 1948 in relying upon such a Consolidated Balance Sheet, as did the courts below, it is curious that the Commission finds itself in disagreement with the accounting standards for this Company established by this Court.

amounted on December 31, 1947, to $20,295,966, as compared to an aggregate claim of the Secured Serial 5¼% Bonds in the hands of the public on that date, of $20,-149,634, while on December 31, 1950, the collateral on the same basis had a value of $28,397,348, as compared with the claim of the Secured Serial 5¼% Bonds, publicly held, of $20,322,235.

(c) **Earnings applicable to NOTM stock:**

The effective date of the predecessor Plan, to the one under review, was January 1, 1943. From that date to January 1, 1948, the effective date of the pending plan, the net earnings applicable to NOTM stock amounted to $14,969,996 (R. pp. 28528-9), or an annual average of $2,993,999. For the period from January 1, 1948, to December 31, 1950, the aggregate net earnings applicable to NOTM stock have amounted to $10,644,255, or an annual average of $3,548,085. It must be borne in mind that net earnings applicable to the stock reflect all charges for maintenance of road and equipment, and that additional investments in these accounts, before additional earnings are reflected, involve increases to charges to operating expenses directly and increased charges for depreciation, so that there is a lag between additional investments and the anticipated earnings to be derived therefrom.

These figures show that for the period January 1, 1943, to December 31, 1950, the total earnings applicable to NOTM stock amounted to $25,614,251. 82% of these earnings, or $21,003,685, accrued to the collateral pledged for the satisfaction of the Secured Serial 5¼% Bonds, or a sum in excess of the total claim of that issue on December 31, 1950.

Earnings of this size, applicable to the collateral, fully support the contention that its value is very much greater than the claim of the Secured Serial 5¼% Bonds.

(d) **Value to a purchaser to whom the element of control will insure a profitable relationship in the control of the interchange of traffic:**

In appraising the value of the collateral, consideration must be given to what the loss of control would mean to MOP by reason of the potential loss of valuable interchange of traffic. Testimony offered in connection with the present Plan (I. C. C. Ex. 969) shows that NOTM carload traffic in 1947 had increased more than 400% during the bankruptcy proceedings. It is evident that as the amount of NOTM traffic has increased and as the territory served continues to grow, the value to MOP of the interchange of traffic with NOTM is immeasurably more valuable than it was when MOP acquired control of NOTM in 1924. The Commission has made no study of the interchange of traffic between MOP and NOTM in terms of dollars and cents of the operating income in any of its reports dealing with this reorganization.

It is not to be supposed that if MOP was confronted with the possibility of losing control of NOTM, that it would hesitate to redeem the pledged securities by the full satisfaction of its obligations to the Secured Serial 5¼% Bondholders. This factor, which the Commission has not dealt with in these terms, must be given its proper weight in any consideration of the value of the collateral.

The Method Employed by the Commission for [illegible]raising the Value of the Collateral Pledged for the Satisfaction of the Secured Serial 5¼% Bonds.

The Commission ignores the methods of valuation outlined above and adopted a procedure not provided for in Section 77.

This procedure involved

> "the fixing of a separate capitalization of New Orleans for the purpose of determining the value of Missouri Pacific's ownership of the stock" (R. p. 28584).

Having developed a "separate capitalization" at $83,700,000, the Commission then deducted the aggregate claims as of December 31, 1947, amounting to $61,428,541, and found the remainder to represent just over $150 per share for each of the 148,329 shares of NOTM outstanding. When it is obvious that the development of a separate capitalization is not a step to the separate reorganization of NOTM, involving a determination of the total amount of issuable securities and the quality of the securities to be issued, a careful scrutiny of the procedure is required. The striking difference between the procedure which appraises value by the relationship of assets and liabilities and that which attempts to determine it by the device of separate capitalization is crystal clear. While the former method recognizes that the position of a pledgee is not static, but is in direct relation to the value of the collateral the latter **limits the valuation of the collateral irrespective of its actual value.** Thus, under the Commission's method, the value of the collateral remains unchanged as of December 31, 1950, despite the fact the value of each NOTM share had increased $66.70 in the period, with a resultant increase in the book value of the collateral pledged for the satisfaction of the Secured Serial 5¼% Bonds in the period by over $8,100,000.

The Securities Allocated Under the Plan to NOTM Stock and the Proposed Distribution Thereof as Respects the Collateral Pledged for the Satisfaction of the Secured Serial 5¼% Bonds.

The Plan provides that NOTM capital stock

> "shall receive for each $100, par value, of said stock, approximately $75, principal amount, of general-mortgage bonds, Series A, $75 of general-mortgage bonds, Series B, and $25 of common stock, Class A, at a stated value of $100 per share" (R. p. 28746).

This allocation of new securities applied to the 121,460 shares of NOTM, pledged for the satisfaction of the

Secured Serial 5¼% Bonds, would require the issuance of $18,219,000 general mortgage bonds and 30,365 shares of Class A Common Stock. The resultant distribution to each $1,000 principal amount of Secured Serial 5¼% Bonds presently outstanding would be approximately $1,750 of general-mortgage bonds and approximately $29 of Class A Common Stock.

The Plan provides that the Secured Serial 5¼% Bonds, as respects these three classes of securities,

> "shall receive for each $1,000 bond and unpaid interest thereon to January 1, 1948, approximately $750, principal amount, of Series A general-mortgage bonds, $750, principal amount, of Series B general-mortgage bonds . . . and $250 of common stock, Class A, at a stated value of $100 per share" (R. p. 28743).

This means that only $15,637,500 of general-mortgage bonds and 26,062.50 shares of common stock, Class A, will be issued in lieu of the 121,460 shares of NOTM stock pledged for the satisfaction of the Secured Serial 5¼% Bonds instead of $18,219,000 of bonds and 30,365 shares of Class A Common Stock.

This reduction of $2,581,500 of general-mortgage bonds and 4,302.50 shares of Class A Common Stock is brought about as the result of a pro rata allocation by the Commission of the aggregate of securities to which the collateral is entitled between the bonds publicly held and the $1,715,000 principal amount acquired by the Bankruptcy Trustee in the course of the proceedings to which reference has been made above. In brief, the Commission has not only frozen the value of the collateral by the employment of the separate capitalization device, but has made a determination completely outside its authority as to the claimants entitled to receive securities allocated to collateral required to be surrendered under a Plan of Reorganization.

The Appropriation of the Property of NOTM Stockholders for the Benefit of Others.

The appropriation is clearly disclosed by the following elementary mathematical computation which shows the appropriation which would have resulted in the three year period 1948-1950, inclusive, if the pending plan had been in operation:

Net Income 1/1-1948 to 12/31-1950, applicable to NOTM stock	$10,644,255
82% thereof applicable to collateral pledged for satisfaction of Secured Serial 5¼% Bonds	8,728,289

The $8,728,289 of earnings applicable to the collateral remains the proportionate share of NOTM earnings for the security of the bonds whether it is distributed as dividends or not. No one else is entitled to participate in a distribution of them. If, however, NOTM is consolidated as proposed, these aggregate net earnings will be available for distribution to claimants holding securities senior to those allocated to NOTM stock and be shared by others who participate in the allocation of the same securities allocated to NOTM stock. It is, therefore, necessary to examine the extent to which these earnings which have accrued in the three years, since the effective date of the Plan, would have been distributed:

Total earnings applicable to the collateral pledged for the satisfaction of Secured Serial 5¼% Bonds		$8,728,289
Less accruals on securities allocated therefor under the pending Plan:		
Interest on $7,818,750 Series A Gen. Mtge. 4¼% Bonds (13½%)	$1,055,531	
Interest on $7,818,750 Series B Gen. Mtge. 4½% Bonds (13½%)	1,055,531	2,111,062
Balance		$6,617,227
Less estimated accumulation of available income for 26,062.50 shs. Class A Common		390,937
Balance appropriated for benefit of others		$6,226,290*

* If for the sake of argument, which we do not admit, the percentage of NOTM stock applicable to the publicly held bond is only 70% of the outstanding shares on the basis of pro-rata allocation provided for by the Commission, the appropriation would nonetheless amount to approximately $5,000,000.

These facts make it clear that the proposed Plan appropriates the property of NOTM stockholders for the benefit of others, the appropriation amounting to over 71% of the amount accruing to them as stockholders of NOTM in a period of three years.

The Requirements of Section 5 of the Transportation Act.

The Plan is based upon the assumption upon the part of the Commission that the requirements of Section 5 of the Transportation Act may be ignored, despite the consistency provisions of Section 77 (f). Substantial additions have been made to the Transportation Act since 1935, but it is significant that none of them have resulted in the elimination of the requirement that Section 77 shall be consistent therewith. Absent any change in this respect by Congressional enactment, no warrant exists for the Commission to ignore the requirements of law in promulgating a plan of reorganization.

NATURE OF THE PROCEEDINGS BELOW.

The Courts below have predicated their opinions upon those assumptions upon which the majority of the Commission predicated the plan of reorganization. This is litigation over such orders, but the issues, while arising out of procedures employed by the Commission in the promulgation of its plan, are, by their nature, also independent of any particular plan.

The pending plan having been referred to the Commission by the District Court in conformity with a petition filed under Section 208, a review of this case will not delay the reorganization.

THE QUESTIONS PRESENTED.

1. Whether it is consistent with the purposes and intent of Section 77 that a proceeding thereunder be predicated upon an intercompany account between debtors participating in the same proceeding.

2. Whether a Court may permit the appropriation of the property of one group to pay the claims of another.

3. Whether the development of a separate capitalization for the purpose of determining the value of stock, including stock pledged for the satisfaction of a debt, is within the power of the Commission.

4. Whether a plan of reorganization under Section 77 may be legally consummated without full observance of the intent, purposes and requirements of Section 5 of the Transportation Act (U. S. C. 49, Chapter 1).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

POINT I.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is in Conflict With the Purposes and Intent of Section 77 in Permitting a Proceeding Thereunder to Be Predicated Upon an Inter-Company Account Between Debtors Participating in the Same Proceeding.

The judgment of the Court below ignores the fact that the continued participation of NOTM in the reorganization of its parent MOP is supported only by the existence of an intercompany account which NOTM owes to MOP. If this obligation did not exist it is obvious that there would

be no vestige of excuse for NOTM's participation in the proceedings, and its position with respect to its parent MOP would be indistinguishable from other subsidiaries of MOP that are not in reorganization, including the Texas & Pacific Railway Co.

Continuing to rely on NOTM's 1933 petition (R. pp. 28547, 28643, 28651) the Commission proposed a plan of reorganization which provided for the inclusion of NOTM and its consolidation with its parent MOP. As a consequence, the Courts below conclude that the Commission has the statutory power

> "to require a merger or consolidation of affiliated railroads under Section 77 of the Bankruptcy Act **when all of the railroads are before the Commission as debtors seeking reorganization and that in such a case the Commission is not required to follow the provisions of the Interstate Commerce Act.**" (Emphasis supplied.) (R. p. 939, CR, p. 22.)

The transparency of the fiction that an intercompany obligation may validly support a participation of NOTM in the reorganization of its parent MOP is revealed by both the Commission and the administrative Court.

The Commission discloses the transparency of this fiction by its finding that independently of value arising from separate capitalization

> "The earnings and property value of New Orleans justify values equal to the principal amount for Missouri Pacific advances to New Orleans (including interest)" (R. p. 28563)

and by the admission that while the intercompany indebtedness is "payable on demand" that "it would constitute an obligation which might require payment at any time" in the contingency that "New Orleans were separated from the system" (R. 28550).

In the case of the administrative Court, which conducts the affairs of the debtors through the agency of a common bankruptcy trustee, that Court's judgment that

> "To keep a debtor which is able, or which can become able by refunding to meets its debts as they mature in a Section 77 proceeding would not be in accord with the policy of that Section and would be in violation of the Fifth Amendment" (R. p. 1039)

the transparency of the fiction is vividly illuminated by the response of the bankruptcy trustee at an earlier hearing in the following colloquy:

> "Q. (By Mr. Biggs) Have you initiated as Trustee of N. O. T. & M. any steps to take New Orleans, Texas & Mexico out of bankruptcy? A. I have not initiated any steps to take the New Orleans out of bankruptcy" (R. p. 1020).

To urge that under the direction of the Court that the trustee of NOTM could not negotiate with himself as trustee of MOP and arrive at a fair and equitable accommodation as to any rearrangement of the inter-company obligation which NOTM owes to its parent MOP would simply be to add another fiction of even greater transparency.

It is plainly inconsistent with the intent and purposes of Section 77 that the provisions of this act should be invoked in connection with an inter-company claim between a parent and subsidiary debtor.

Such a condition if uncorrected will result in a serious encroachment on the protection to which public investors are entitled.

POINT II.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is in Conflict With the Decision of This Court in the Milwaukee Case in Permitting the Property of One Group to Be Appropriated to Pay the Claims of Another.

The Court below completely ignores the violation of rule of this Court in the Milwaukee case (318 U. S. 523) as shown by the elementary mathematical calculation set out above which showed the appropriation of the property of NOTM stockholders which would have resulted in a three year period had the plan under review been in operation.*

It appears that the Court below conceived that the decisive issue was simply the determination of capitalization and the allocation of securities, and completely failed to come to grips with the problem of appropriation which the application of the plan so clearly reveals. The financial intricacies of a railroad reorganization are such that as this Court pointed out in the Milwaukee case, "The property of one group will be subtlely appropriated to pay the claim of another while lip service is rendered the principles of priority" (318 U. S., p. 570). The figures which reflect the appropriation in the instant case are actual dollar and cents figures recorded on the books of the corporation in conformity with the regulations of the Commission. They are not a "mathematical formula" as that term appears in the Milwaukee case (318 U. S., p. 566).

The figures presented above and in Appendix A speak far more eloquently than any argument. Unless the proposed consolidation of NOTM with its parent MOP is arrested, protection against "subtle appropriation" heretofore afforded by the principles enunciated in the Milwaukee case will be completely dissipated.

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* The court below appears to have thought this appellant's objections were presented by others, and given no consideration to appellant's presentation of this point.

POINT III.

The Decision of the Circuit Court of Appeals for the Eighth Circuit by Approving the Development of a Separate Capitalization for NOTM for the Purpose of Determining the Value of NOTM Stock, Extends the Powers of the Commission in Matters of Capitalization Beyond Those Established in the Western Pacific Case.

The aggregate value of marketable collateral consisting of a single class of common stock carrying control depends on the net worth of the company, earnings applicable to the shares, and its value to investors or to a purchaser to whom the acquisition of control brings other advantages. Section 77 (b) affords a means for the determination of the value of such a block of shares in the provision for "the sale of all or any part of the property of the debtor at not less than a fair upset price."

As set out in the Western Pacific case, this Court has clearly outlined the powers of the Commission in matters of capitalization in the following language:

> "The development of the capitalization of the reorganized company which is entrusted solely to the Commission under the requirement that the plan be compatible with the public interest is that relating to the total amount of issuable securities and the quality of the securities issued" (310 U. S., p. 474).

It is conceded that there is no intention of issuing any new securities of NOTM in connection with these proceedings. Certainly in defining the powers of the Commission in the language employed in the Western Pacific case, this Court did not contemplate that the Commission would employ the device of capitalization to freeze the value of collateral pledged for the satisfaction of a debt to a figure less than the claim of a pledgee at a moment when the collateral was rapidly increasing in value. As a result,

although there has been an increase in net worth applicable to the collateral of more than $8,100,000 which we have pointed to above, its value remains the same on the basis of capitalization.

To permit the employment of the Commission's powers with respect to matters of capitalization in such a fashion, would constitute an approval of the result reflected in the instant case.

POINT IV.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Fails to Deal With Basic Questions of Law Inherent in the Proposed Consolidation Contemplated by the Plan of Reorganization by Reason of the Failure of the Plan to Provide for Full Observance of the Requirements of Section 5 of the Transportation Act (U. S. C. 49, Chapter 1).

Briefly, Section 5 requires applications to the Commission upon the part of the companies proposing to consolidate, requires a consideration of the inclusion, or failure to include, other railroads in the territory, and the assent thereto by the requisite votes of the stockholders.

Section 77 (f) provides that

> "Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of Chapter 1 of Title 49 as of on August 27, 1935, or thereafter amended."

We submit that basic questions of law are not resolved by the decisions of the Court below where the Court finds no occasion in its opinion "to add to what the Commission

in its report and the District Court in its opinion have said in support of the legality and propriety of those provisions of the plan prescribing a system reorganization" (CR p. 25).

We submit that this Court should resolve this conflict.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be granted. Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit to review the order and judgment of that Court in the above cause, and that said order and judgment be reversed; and that your petitioner be granted such other and further relief as may seem proper.

Respectfully submitted,

WILLIAM H. BIGGS,
Security Building,
St. Louis 2, Missouri,
Attorney for Petitioner.

GULF COAST LINES

APPENDIX A.

COMPARATIVE BALANCE SHEET

DECEMBER 31, 1950 AND DECEMBER 31, 1947

ASSETS	December 31, 1950	December 31, 1947
Investments:		
Road and equipment property	$102,856,495.25	$ 86,602,407.55
Acquisition adjustment	(49,466.39)	(47,417.84)
Donations and grants	(3,974,466.90)	(3,967,997.37)
Accrued depreciation—road	(2,166,349.78)	(1,412,203.88)
Accrued depreciation—equipment	(7,617,519.10)	(7,393,741.57)
Accrued amortization of defense projects—road.	(991,211.15)	(1,019,410.00)
Accrued amortization of defense projects—equipment	(3,863,231.03)	(3,493,466.71)
Capital and other reserve funds	2,102,766.33	1,511,887.10
Maintenance funds	.....	256,866.20
Miscellaneous physical property	4,113,300.07	3,693,478.70
Accrued depreciation — miscellaneous physical property	(490,298.32)	(210,919.69)
Investments in affiliated companies—pledged	3,367,775.71	3,367,775.71
Investments in affiliated companies—unpledged.	3,547,462.06	2,725,823.55
Other investments—unpledged	1,061.00	1,001.00
Total investments	$ 96,836,317.75	$ 80,614,082.75
Current Assets:		
Cash	$ 3,349,731.67	$ 2,860,337.06
Temporary cash investments	4,919,234.90	4,289,937.70
Special deposits	603,590.15	1,442,483.44
Loans and bills receivable	.....	31,700.00
Net balances receivable from agents and conductors	911,360.46	686,182.59
Miscellaneous accounts receivable	2,059,681.05	1,362,513.61
Materials and supplies	2,071,185.64	2,615,448.80
Interest and dividends receivable	2,171.40	1,087.94
Accrued accounts receivable	1,723,221.67	911,368.32
Other current assets	41,746.14	100,384.33
Total current assets	$ 15,681,923.08	$ 14,301,443.79
Deferred Assets:		
Working fund advances	$ 9,769.96	$ 9,145.06
Other deferred assets	239,217.55	251,847.18
Total deferred assets	$ 248,987.55	$ 260,992.24
Unadjusted Debits:		
Prepayments	$ 93,657.33	$ 100,071.98
Other unadjusted debits	676,480.42	1,559,455.89
Total unadjusted debits	$ 770,137.75	$ 1,659,527.87
Total assets	$113,537,366.09	$ 96,836,046.65

LIABILITIES AND NET WORTH	December 31, 1950	December 31, 1947
Stock:		
Capital stock	$ 15,000,000.00	$ 15,000,000.00
Less—portion held by or for company	167,100.00	167,100.00
Total stock	$ 14,832,900.00	$ 14,832,900.00
Long Term Debts:		
Funded debt unmatured	$ 42,645,900.00	$ 42,645,900.00
Less—portion held by or for company	2,030,000.00	2,030,000.00
Total	$ 40,615,900.00	$ 40,615,900.00
Equipment obligations	7,027,085.20	2,720,960.24
Amounts payable to affiliated companies	19,586,041.26	18,091,680.92
Total long term debt	$ 67,229,026.46	$ 61,428,541.16
Current Liabilities:		
Traffic and car services balance—credit	$ 377,069.12	$ 405,256.97
Audited accounts and wages payable	3,242,730.18	3,320,549.85
Miscellaneous accounts payable	428,425.14	389,751.23
Interest matured and unpaid	165,713.58	444,682.05
Dividends matured and unpaid	4,604.00	4,610.00
Unmatured interest accrued	648,471.12	605,380.90
Accrued accounts payable	1,083,638.09	1,397,051.12
Accrued tax liability	3,990,535.91	2,322,156.38
Other current liabilities	467,874.08	422,449.35
Total current liabilities	$ 10,409,061.22	$ 9,311,887.85
Deferred Liabilities:		
Other deferred liabilities	$ 440,751.56	$ 263,311.30
Unadjusted Credits:		
Maintenance reserves	$	$ 180,797.81
Other unadjusted credits	778,213.60	864,966.50
Total unadjusted credits	$ 778,213.60	$ 1,045,764.31
Surplus:		
Excess of book value of securities of subsidiary companies at date of acquisition over cost thereof	$ 5,534,282.94	$ 5,534,282.94
Unearned surplus	34,666.12	16,204.34
Earned surplus—appropriated	2,917,280.27	2,248,206.30
Earned surplus—unappropriated	11,361,183.92	2,154,948.45
Total surplus	$ 19,847,413.25	$ 9,953,642.03
Total liabilities and net worth	$113,537,366.09	$ 96,836,046.65

NET BOOK VALUE PER SHARE

	December 31, 1950	December 31, 1947
Total Assets	$113,537,366.09	$ 96,836,046.45
Total Liabilities	78,857,052.84	72,049,504.62
Net Worth	$ 34,680,313.25	$ 24,786,541.83
Book Value Per Share (148,329 shares)	$ 233.80	$ 167.10

( ) = Credit balance.

FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 526.

MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS,
BONDHOLDERS PROTECTIVE COMMITTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY FIRST MORTGAGE,
EDMUND WRIGHT, *et al.*,
PROTECTIVE COMMITTEE FOR HOLDERS OF GENERAL MORTGAGE BONDS,
MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,
Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

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Dated: New York, N. Y., February 7, 1952.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

1951 R. = The printed record filed in said United States Court of Appeals in Causes Nos. 14,264-14,274.

Texas R. = The printed record filed in said Court of Appeals in Cause No. 14,256.

1946 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

1941 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

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MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE,

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GROUP OF INSTITUTIONAL INVESTORS,
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EDMUND WRIGHT, *et al.*,
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MANUFACTURERS TRUST COMPANY, as Trustee,
BANKERS TRUST COMPANY, as Trustee,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-35)* is reported at

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* A list of abbreviations and references used in this brief is on page iii, *supra*.

191 F. 2d 265 (8 Cir. 1951). The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Questions Presented.

1. Whether the holders of a junior interest [5¼% Secured Serial Gold Bonds of Missouri Pacific Railroad Company] in a bankrupt railroad company have been accorded a fair and equitable position in the Plan of Reorganization as required by Section 77 of the Bankruptcy Act, 11 U. S. C. §205.

On January 28, 1952, this Court denied certiorari in *James B. Morris, et al.* v. *Group of Institutional Investors, et al.* (October Term 1951, No. 415). Petitioners here, like those in No. 415, are representatives of holders of Missouri Pacific Railroad Company 5¼% Secured Serial Gold Bonds which are secured by the pledge of about 82% of the capital stock of the New Orleans, Texas & Mexico Railway Company, a debtor in these proceedings. Here, as in No. 415, this Court is asked to reexamine the finding of the Commission, concurred in by the two Courts below that the Secured Serial Bondholders received full compensatory treatment in the Plan of Reorganization. Therefore, respondent respectfully refers this Court to its brief in No. 415 for the statement of its reasons why certiorari should be denied.

2. Whether the Interstate Commerce Commission, acting under Section 77 of the Bankruptcy Act, 11

U. S. C. §205, has the power to provide in a plan of reorganization for the merger or consolidation of the three principal debtors into one corporation where one of the debtors owns about 95% of the capital stock of the second which in turn owns all the capital stock of the third, and the three have been operated on a unified basis for the last 28 years.

3. Whether the findings by the Commission and District Court that the New Orleans, Texas & Mexico Railway Company is still in need of reorganization and should be included in the System reorganization are supported by the evidence.

Statement.

The Missouri Pacific System comprises three major units: (1) the Missouri Pacific Railroad Company and its wholly owned subsidiaries, which together own about 6,328 miles but operate about 7,236 miles of railroad, (2) the New Orleans, Texas & Mexico Railway Company and its subsidiary railroad companies (commonly called the Gulf Coast lines), which together own about 1,623 miles but operate about 1,860 miles of railroad, and (3) the International-Great Northern Railroad Company and its subsidiary, which together own about 1,000 miles but operate about 1,155 miles of railroad (1941 R. 302-309).

On June 12, 1924, the New Orleans was authorized to acquire control of the International by purchase of stock (*Control of International-Great Northern R. R.*, 90 I. C. C. 262). On December 8, 1924, the Missouri Pacific was authorized to acquire control of the New Orleans (*Control of Gulf Coast Lines by M. P. R. R.*, 94 I. C. C. 191). At present, all of the capital stock of the International is owned by the New Orleans and approximately 95% of the capital stock of the New Orleans is owned by the Missouri Pacific (1941 R. 305,

308). Since 1924 the System has been "selling the public that the Missouri Pacific Railroad, the Gulf Coast lines and the International-Great Northern were all one family and not three separate families. During those [28] years, by advertising, or word of mouth and in a thousand ways shippers have been trained to route their freight or travel over these lines the same as though they were one line" (1951 R. 842). Proceedings for unification of the System pursuant to Section 5 of the Interstate Commerce Act had been undertaken in 1930 (*Missouri Pac. R. Co. Unification,* 166 I. C. C. 154 and 175 I. C. C. 26) and were dismissed after the institution of these reorganization proceedings (1941 R. 397; 239 I. C. C. 83).

The present Plan of Reorganization is the third to be approved by the Interstate Commerce Commission for the Missouri Pacific System. All three plans have provided for the consolidation of the System properties into one corporation (1941 R. 505, 506; 1946 R. 797, par. C; D. R. 28693, par. C). In its original report, the Commission said (1941 R. 299, 398; 239 I. C. C. 7, 85):

> "The proposed consolidation covers only owned properties which at the present time are being operated as a system. The record shows that certain economies may reasonably be expected to be effected thereby and that better service probably will result from continued system operation rather than from separate operation. A consolidation of the various system companies upon reorganization will permit a simplified capital structure."

The Commission concluded (1941 R. 400-401; 239 I. C. C. 7, 87):

> "The record* is persuasive that the proposed consolidation will result in benefit to the public, to

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* See Texas R. 29-59.

> the creditors of the debtors and to such of their stockholders as may have an interest in the new company . . . We find that, upon the record in this proceeding, and as a part of a plan of reorganization of the debtors, the proposed consolidation of the properties of all the debtors herein, excepting the Missouri-Illinois, will meet with the requirements of subsections (b) and (e) of Section 77 of the Bankruptcy Act, as amended, and will be compatible with the public interest."

In its Fifth Supplemental Report approving the present Plan of Reorganization the Commission said (D. R. 28646):

> "That separate incorporation of the debtors . . . would not accord with the national transportation policy; would not be consistent with the public interest and would constitute a burden on the obligations of the companies efficiently to render transportation services in interstate commerce."

See also Fourth Supplemental Report, D. R. 28547-548, 28616-617.

The Plan of Reorganization provides for the consolidation of the New Orleans, Texas & Mexico Railway Company with the rest of the System. On March 31, 1933, the New Orleans petitioned the District Court to be allowed "to effect a plan of reorganization in connection with, or as a part of, the Plan of Reorganization of Missouri Pacific Railroad Company." In its Fifth Supplemental Report the Commission carefully considered the "status of the New Orleans in the reorganization" and found "that the obligations of the New Orleans can be properly rearranged only by a reorganization" (D. R. 28643, 28646). The District Court discussed in great detail the evidence with respect to the possibility of the termination of the reorganization proceedings as to the New Orleans (93 F.

Supp. 856-862) and concluded that the New Orleans was still unable to meet its debts as they matured (*id.* at pp. 859, 862).

On January 22, 1952, this Court denied certiorari in *State of Texas* v. *Group of Institutional Investors, etc.* (October Term 1951, No. 416), where Petitioner challenged the power of the Commission to provide for a consolidation of the System lines which might offend against Texas local law.

Argument.

The District Court recognized that "if during the course of the reorganization proceedings, the Debtor becomes able to meet its debts as they mature, by refunding or otherwise, the proceedings should be dismissed" (93 F. Supp. at pp. 857-58). Its refusal to dismiss the proceedings with respect to the New Orleans was based solely on its finding of fact that that Debtor could not so meet its debts. This finding was made after a careful analysis of the evidence on that issue (93 F. Supp., pp. 857-862), and the finding was affirmed by the Court of Appeals (191 F. 2d at p. 271). No reason exists for this Court to re-examine this issue of fact.

The power of the Commission to provide in a Plan of Reorganization for the consolidation of the System lines into one corporation is clear from the statute, and has been sustained by decisions of the Courts.

I.

Section 77 grants power to the Commission to consolidate the system lines.

Section 77(a), 11 U. S. C. §205(a) provides in part that:

> "Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned . . . by any railroad corporation filing a petition as a debtor may file . . . in the same proceeding, a petition stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with or as part of the plan of reorganization of such other debtor . . ."

On March 31, 1933, the Missouri Pacific Railroad Company filed a petition under Section 77(a). Thereafter, the New Orleans, Texas & Mexico Railway Company, "the majority of the capital stock of which having power to vote for the election of directors is owned" by the Missouri Pacific, also filed a petition under Section 77(a) "to effect a reorganization in connection with or as part of the plan of reorganization" of the Missouri Pacific.

Section 77(b), 11 U. S. C. §205(b) provides in part that "A plan or reorganization . . . :

> "5. Shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations."

The Plan of Reorganization (D. R. 28693, par. C) provides for the transfer of any interest in or control of all or any

part of the property of the debtor, the New Orleans, Texas & Mexico Railway Company, to another corporation, "the merger or consolidation of the debtor with another corporation." Thus the Plan does exactly what the Statute says it can do.

Petitioners assert that consolidation violates Section 77(f) because it is inconsistent with the provisions and purposes of Section 5 of the Interstate Commerce Act, 49 U. S. C. §5 (Petition, p. 18). An analysis of the requirements of Section 5 shows that this is not the case:

Requirements of 49 U. S. C. §5	Reports of Commission in this case
"the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated . . . and shall afford reasonable opportunity for such interested parties to be heard" (Section 5(b)).	"During the course of the present proceeding and prior to the commencement of the hearings at which the subject of the consolidation of the debtors was considered, notices of the time, place, and subject matter of the hearing, and invitations to be represented and introduce such evidence or make such representations as they might desire, were sent to the Governor of each of the States in which any part of the properties proposed to be consolidated are located" (1941 R. 398; 239 I. C. C. 85).
"If the Commission finds that . . . the proposed transaction . . . will be consistent with the public interest, it shall enter an order approving such transaction" (Section 5(b)).	"We find . . . separate incorporations of the system lines would not accord with the national transportation policy, will not be consistent with the public interest and will constitute a burden on

	the obligations of the companies efficiently to render transportation services in interstate commerce" (D. R. 28617; see also 1941 R. 401; 239 I. C. C. 87).
"the Commission shall give weight to the following considerations, among others: "(1) The effect of the proposed transaction upon adequate transportation service to the public."	"The record shows that certain economies may reasonably be expected to be effected thereby and that better service probably will result from continued system operation rather than from separate operation" (1941 R. 398; 239 I. C. C. 85; see also D. R. 28616-17, 28646-647).
"(2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction."	"The lines of railroad proposed to be consolidated are not parallel or competitive as between the three groups of railroads which will comprise the new consolidated company, and none of them is assigned by our Order in Consolidation of Railroads [159 I. C. C. 522], to any other system" (1941 R. 400-401; 239 I. C. C. 87).
"(3) the total fixed charges resulting from the proposed transaction" (Section 5(c)).	"the securities to be issued in the reorganization should be of such kind and of such amounts as to insure coverage of fixed interest in years of least favorable earnings . . .

	"fixed interest obligations would constitute 37.36 percent of total capitalization. . . . While this ratio of debt to total capitalization is somewhat higher than . . . in our approved plan of 1944, the recent larger earnings and more favorable future prospects of the debtors . . . justify the moderate increase" (D. R. 28564-566).
"Protection of employees" (Section 5(f)).	"Protection of interests of employees of debtors" (D. R. 28612-613).

Clearly the consolidation of the System lines is perfectly consistent with the purposes and provisions of 49 U. S. C. §5.

Petitioners also maintain that the debtors themselves must petition for consolidation. There is nothing in Section 77 to warrant this position. The debtors are controlled by boards of directors completely shut off from any part in the management of the railroad. The boards are elected by equity interests which may be declared worthless and denied further participation in the reorganized company. After bankruptcy such interests could not possess a determining voice with respect to such a vital part of the Plan.

II.

There is no conflict of decision.

Both this Court and two Courts of Appeals have recognized the existence of the power of the Commission to provide in a plan of reorganization for the consolidation of

affiliated debtors. *Callaway* v. *Benton*, 336 U. S. 132, 140 (1949); *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538, 544 (5 Cir. 1950), cert. denied 339 U. S. 929; *In re Chicago, R. I. & P. Ry. Co.*, 168 F. 2d 587, 594 (7 Cir. 1948), cert. denied sub nom. *State of Texas* v. *Brown*, 335 U. S. 855.

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
JAN 11 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 527

JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company, *Petitioners,*

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

and

MOTION TO VACATE FORTHWITH THE OPINION AND JUDGMENT BELOW, TO DEFER CONSIDERATION OF ALL PETITIONS FOR WRITS WITH RESPECT THERETO AND FOR OTHER RELIEF.

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January 10, 1952.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

(49)

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IN THE

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OCTOBER TERM, 1951.

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JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company, *Petitioners,*

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners, John V. Farwell, III, Bolton Sullivan and Cary N. Weisiger, Jr., Directors of the Missouri Pacific Railroad Company, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit, entered August 14, 1951, affirming an order of the District Court for the Eastern Division, Eastern Judicial District of Missouri, which approved a plan of reorganization for the Missouri Pacific and other railroad companies, debtors, in a proceeding under Section 77 of the Bankruptcy Act.

OPINIONS BELOW.

The opinion of the Court of Appeals (RCA,[1] 14-36) is reported in 191 F. 2nd 265. The opinion of the District Court (R II, 915-45) is reported in 93 F. Supp. 832. The reports and order of the Interstate Commerce Commission (LII)[2] are reported in 275 I.C.C. 59 and 275 I.C.C. 203.

JURISDICTION.

The judgment of the Court of Appeals was entered August 14, 1951 (RCA, 37-40). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

However, the case involves a special jurisdictional problem under Section 208(a)(5) of the Bankruptcy Act (11 U.S.C., Section 208(a)(5)), which is the subject of the attached Motion to Vacate Forthwith the Opinion and Judgment Below, to Defer Consideration of All Petitions for Writs with Respect Thereto, and for Other Relief.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals had power or jurisdiction to approve the plan, after a petition under Section 208(a)(1) of the Bankruptcy Act had been filed and referred to the Commission, and after the provisions of Section 208(a)(5) had become operative.

2. Whether the Commission had power or authority, under Section 77(f) of the Bankruptcy Act, to require the involuntary consolidation of the Missouri Pacific and other

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[1] RCA refers to separately printed Record of Proceedings in the Court of Appeals.

[2] LII refers to separately printed Volume LII of Record, containing the Commission's Reports and Order setting forth the plan.

debtor railroads, without provision for compliance with Section 5(2) of the Interstate Commerce Act.[3]

3. Whether the plan provisions vesting control of these vast railroad properties in a handful of banks and insurance companies, having minor beneficial ownership, are legal and equitable under Section 77 and in accordance with public policy.

4. Whether the Commission and Courts, in disregarding the actual earning record and value of the properties, observed legal standards under Section 77, particularly Subsection (e).

5. Whether the cash provisions of the plan and the refusal to use cash to acquire debts at a discount accord with legal and equitable standards and policies under Sections 77 and 208 of the Bankruptcy Act.

6. Whether changed conditions have rendered the plan obsolete, inequitable and inconsistent with the standards and policies of Sections 77 and 208.

STATUTES INVOLVED.

The statutes involved are:

Section 208 of the Bankruptcy Act (11 U.S.C., Section 208), particularly Subsections (a)(1), (a)(5) and (b).

Section 5 of the Interstate Commerce Act (49 U.S.C., Section 5), particularly Subsection (2).

Section 77 of the Bankruptcy Act (11 U.S.C., Section 205), particularly Subsections (b), (e) and (f).

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[3] There is also a related question of equitable procedure and jurisdiction: Whether the rulings below were proper, holding that the District Court lacked jurisdiction to entertain a petition by the Independent Directors to declare the consolidation unlawful, to disentangle this naked underlying legal issue from the mass of complicated factual issues and to expedite its determination. (R. II, 1059-81, 1083-6, RCA, 36)

STATEMENT OF THE CASE.

This is a proceeding under Section 77 of the Bankruptcy Act for the reorganization of the Missouri Pacific Railroad Company, the New Orleans, Texas & Mexico Railway Company, the International-Great Northern Railroad Company (called the principal debtors, sometimes referred to respectively as the Missouri Pacific, NOTM and I-GN) and twenty-one other debtor railroads.

The petitioners (referred to as the Independent Directors) are directors of the Missouri Pacific. They or their predecessors have been elected through cumulative voting procedures (guaranteed under the laws of Missouri, where the Company is incorporated) at each of the Company's annual meetings over a period of eight years by the votes of holders of between approximately 20% and 25% of the shares of Missouri Pacific stock, common and preferred, voting at the meetings.[4]

Plans of reorganization approved by the I.C.C. in 1940 and 1944, respectively, were never confirmed or consummated. The 1940 plan was returned upon consent of the parties in light of changed conditions. The 1944 plan, again because of changed conditions, and upon the recommendation of the Commission itself, was returned by mandate of the Court of Appeals in September, 1947, for further investigation, consideration and recommendation.[5] The Commission thereupon ordered hearings to consider modifications of the 1944 plan and the proposal of other plans (R I, 2-4).

On October 24, 1947, the Commission granted the Independent Directors leave to intervene as parties. At the I.C.C. hearings, held March 23-26, 1948, they submitted and

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[4] Between 200,000 and 300,000 shares, common and preferred, have annually been voted for Independent Directors. E.g., see R II, 795-6.

[5] See mandate and District Court order, referred to at RCA, 45. For I.C.C. recommendation, see Exh. B attached to Exh. 1009 before I.C.C.

supported the Independent Directors Plan (Exh. 1009), providing basically for the separate reorganization of each of the principal debtors, while preserving the pre-bankruptcy intercorporate pattern, and providing for preliminary debt reductions and for substantial recognition of the present preferred and common stock of the Missouri Pacific. One of their key and consistent points of advocacy, in addition to separate reorganizations, has been to avoid drastic reorganizations and forfeitures by the use of large cash accumulations in the several estates to acquire at available discounts, and eliminate further interest accruals on, claims of bondholders that must be satisfied ahead of the stock.[6]

On the basis of the hearings held in March, 1948, the third attempted plan (the subject of the instant petition) was thereafter promulgated by the Commission in reports and orders dated August 2, and December 29, 1949 (LII). In fundamental approach and structure this plan is similar to its predecessors.

Hearings on objections to the plan and claims for equitable treatment, filed by the petitioners and other parties in interest, were held by the District Court March 27-April 1, 1950 (R II, 532-9, 560-914).[7] On July 29, 1950, the Court filed its opinion, and on October 3, 1950, entered its Findings, Conclusions and Order, approving the plan in all respects and overruling all objections and claims for equitable treatment (R II, 915-54).[8]

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[6] E.g., see R I, 335-6, 343-6, 350-2; R II, 532-9, 900-12, 1003-8.

[7] At the same time hearing was held on the Independent Directors' petition to declare the consolidation unlawful, for a separate hearing and order on this underlying issue and for other relief (R II, 564-5, 567-73, 760-3, 787-90, 793-815, 828-33, 872-6, 913-14).

[8] On the same dates, respectively, the District Court filed a memorandum opinion and order, dismissing the Independent Directors' petition, described in the preceding footnote, on the ground that "the Court has no jurisdiction to entertain said petition" (R II, 1083-6).

Upon appeals by the petitioners and other parties, the Court of Appeals for the Eighth Circuit heard oral argument on May 10, 1951.

With the appeals pending, several parties on July 13, 1951, filed in the District Court (where proceedings to confirm the plan had already been instituted) a petition under Section 208(a)(1) of the Bankruptcy Act, seeking a Commission hearing and report on changed conditions affecting the plan. The petition was duly referred to the I.C.C., which fixed September 15, 1951, as the date for filing replies.

Meanwhile, on August 14, 1951, the Court of Appeals issued its opinion and entered judgment, affirming the District Court's approval of the plan (RCA, 14-40).[9]

The plan provides basically that the debtor railroads and two non-debtor companies shall be consolidated or merged (LII, 28693). The proposed capitalization of the proposed consolidated company is set forth in Volume LII, pp. 28464, 28565; and the proposed distribution of cash and new securities in Appendices C and D thereof opposite p. 28636.

The plan wipes out the present common stock of the Missouri Pacific and provides only partial recognition of the claim of the preferred stock (LII, 28592-3, 28745, App. C and D opp. 28636).

Further discussion of these matters, as well as the methods employed in fashioning maximum capitalization figures, the control provisions, the cash provisions and other aspects of the plan, will appear in the following parts of this petition.

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[9] The Court of Appeals simultaneously affirmed the District Court's order, No. 3662, described in the preceding footnote (RCA, 36).

REASONS FOR GRANTING THE WRIT.

A. The importance of the case and need for review.

This is the largest railroad reorganization pending in the Federal Courts. It affects three of the country's major railroads and twenty-one smaller roads, having assets, stated in financial reports to the Interstate Commerce Commission, aggregating almost a billion dollars. The Missouri Pacific alone owns and operates more than 7,000 miles of road, and the other debtors a total of over 3,000, or an aggregate of more than 10,000 miles, serving eleven midwestern and southwestern States.

The proceedings affect scores of thousands of security holders, throughout the Nation and the world, holding securities of the respective debtors. The capital structures consist of three major hierarchies, comprising a total of 19 classes of securities, some of which are subdivided into three, four or five series. The litigation affects the control and management, as well as the thousands of employees, of these huge enterprises. It affects at least thirty-five formal parties in interest, including various secured and unsecured bondholders' groups and committees, various stockholders' committees, corporate and individual trustees, Federal and State Governments, labor organizations, corporations, institutions and individuals. In the fullest sense of the word, the proceedings affect the public interest and have attracted wide attention in the Congress[1] and the press.

Neither the 1940 nor the 1944 plan was reviewed by this Court.[2] The third attempted plan, of 1949, offers the first occasion for the Supreme Court to examine the manifold controversies herein. This plan divided the Interstate

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[1] E.g., in addition to earlier references, see S. Res. 241, 81st Cong., 1st Sess. and proceedings thereunder; also S. Res. 229, 82nd Cong., 1st Sess.

[2] A collateral issue affecting the 1944 plan, however, was reviewed by this Court in *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211 (1948).

Commerce Commission itself both as to its basic legality and propriety and as to some of its details (LII, 28630-6, 28685-6).[3]

The Congress and the President for some years have been concerned with the administration of Section 77 and with the forfeitures decreed therein. As administered by the Commission and Courts the Act has been found wanting. It has involved complex solutions to relatively simple problems and drastic measures to overcome limited difficulties. It has involved protracted litigation and long lapses of time between formulation and confirmation of plans. Above all, perhaps, the administration of the Act has been criticized as being unrealistic, in the face of changing conditions, and inflexible.[4] In 1948 a new piece of legislation, Section 208 of the Bankruptcy Act, was enacted to help meet some of the problems.[5] The policies and procedures of this new law, never before invoked or interpreted, arise to be honored or dishonored, effectuated or emasculated, in the case at bar.

The plan decrees irrevocable forfeitures. Unless such grave results are compelled by the facts and applicable statutes beyond a reasonable doubt, every power in law and equity should be exerted to avert them.

In addition to the foregoing general reasons, there are many particular reasons, with reference to the numbered questions presented above, for granting the writ requested.

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[3] Three members (Commissioners Splawn, Alldredge and Aitchison) dissented. Commissioner Cross did not participate. Of the 7-member majority in the Fourth Supplemental Report of August 2, 1949 one member, Commissioner Miller, died on December 24, 1949, before the Fifth Supplemental Report and Order was made. Thus the plan was certified on the basis of a 6-to-3 approval.

[4] E.g., see Sen. Rep. 925, 79th Cong., 2nd Sess.; Sen. Rep. 1170, 79th Cong., 2nd Sess.; House Rep. 923, 80th Cong., 1st Sess.; President's Memorandum, Aug. 13, 1946, on S. 1253, 79th Cong., 2nd Sess.

[5] See Sen. Rep. 897, 80th Cong., 2nd Sess., accompanying the bill.

1. The Court of Appeals had no power to approve the plan.

The question here involves the scope, purpose and effect of the statutory injunction contained in Section 208(a)(5) of the Bankruptcy Act, the new law approved April 9, 1948. In this aspect the case is one of first impression.

Until July 13, 1951, when a petition was filed, requesting determination by the Commission of changed conditions affecting the 1949 plan herein, the statute had never before been invoked or applied. Upon the filing of such a petition, Section 208(a)(5) suspends all further proceedings for confirmation of the old plan, pending the outcome of the Commission's review. Yet the Court below proceeded on August 14, 1951, to enter its opinion and judgment, approving the old plan.

The Courts have had no previous occasion to interpret the injunctive and other provisions of the new law, which affect and will affect huge railroad properties, and their many thousands of security holders, in reorganizations under Section 77.

If, after a petition is filed under Section 208(a)(1) and while the Commission is charged with determining changed conditions affecting the old plan, the Courts nevertheless retain power to further the old plan, or add judicial sanction thereto, the quality and effectiveness of the Commission's review will be grossly impaired. The administration of the new law will limp or altogether fail, and reorganization procedures, instead of being corrected, will be more than ever confounded. The very purpose of the legislation to remedy the faults under Section 77 will be defeated and the act of Congress flouted.

These problems are novel, substantial and important. They should receive a definitive Supreme Court adjudication. A basic preliminary problem, however, is inherently involved, which is the subject of the motion attached to this petition.

2. The Commission had no power to impose the consolidation.

The question here has never been squarely adjudicated. So far as the Supreme Court is concerned, the case in this aspect also is one of first impression. To the extent that the Commission and other Courts have adverted to the matter, the issue has divided them.

The question basically is whether Section 77 of the Bankruptcy Act enlarged the powers of the Interstate Commerce Commission over railroad consolidations beyond those conferred by Section 5 of the Interstate Commerce Act. Or, more precisely: Under Section 77(f), has the Commission power to impose an involuntary consolidation, without provision for compliance with Section 5(2) of the Interstate Commerce Act?

Section 5 of the Interstate Commerce Act, historically and actually the governing statute on railroad consolidations, provides for consolidations on a *voluntary* basis only. Moreover, it prescribes special and unique proceedings and requirements for this purpose. For example, the proceedings must be initiated by an *application of the carriers* seeking authority to be consolidated. They must show *assent to the transaction by at least a majority of their respective stockholders* at a regular or special meeting called for such purpose. The Commission *must consider* the effect upon the public interest of the inclusion, or failure to include, *other railroads in the territory.* In the case at bar, none of these things was done (R II, 796-7).[6] These procedures and requirements of Section 5(2) were ignored, violated, flouted.

Section 77 of the Bankruptcy Act itself affirms and preserves the primacy of Section 5 in the field of railroad consolidation. Section 77(f) specifically enjoins the Commission to grant only such authority for a consolidation or

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[6] Far from assenting, the stockholders of the respective debtors, insofar as they are represented in this proceeding, have all actively objected to the plan (R II, 513-39, 541-59).

merger of the debtor's property as may be "not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended." This clause, with obvious reference to Section 5, is sometimes called the "consistency clause".

The legislative history, intent and relationship of the two Acts, as well as their plain language, spell out a clear limitation upon the Commission's powers in Section 77 proceedings as regards consolidation.[7] No consolidation, involuntary or inconsistent with the provisions and purposes of Section 5 of the Interstate Commerce Act, is authorized by either statute. Here the Commission went beyond its powers and violated both.

The only relevant reference by the Supreme Court to the relationship of the two Acts was not focused on the consistency clause of Section 77(f) and occurred in a case which concerned an altogether different problem.

Callaway v. *Benton*, 336 U. S. 132 (1949)

Nor have the Courts of Appeals determined the precise issue. Their rulings and language offer no clear guide.

In re Chicago, Rock Island & Pac. Ry. Co., 168 F. 2nd 587 (7th Circuit, 1948); cert. denied 335 U. S. 855

In re Florida East Coast Railway Co. (*sub nomine Altantic Coast Line R. Co.* v. *St. Joe Paper Co.*) 179 F. 2nd 538 (5th Circuit, 1950); cert. denied 339 U. S. 929[8]

The *Rock Island* case turned on the question of laches. Its language on statutory powers over consolidations was unessential to the decision and was made without benefit of briefing on the legislative history referred to above.

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[7] For a brief summary of these matters, see R II, 1064-80.

[8] Neither the petition for writ nor the oppositions raised the question of statutory power to compel the merger prescribed by the Commission in that case.

In the *Florida East Coast* case, the plan required the consolidation or merger of the debtor with an unaffiliated non-debtor road over the objections of holders of a majority of the mortgage bonds, who claimed equitable ownership of the debtor. Circuit Judge Sibley sat as Judge Designate in the District Court. He held that the consistency clause of Section 77(f) applies throughout Section 77 and that the compelled merger was not authorized by the permissive language of Section 77(b).

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by *permitting* a merger to be part of a plan." (*In re Florida East Coast Railway Co.*, 81 F. Supp. 926, D.C.S.D., Florida, 1949)

The Court of Appeals, Fifth Circuit, by a 2-to-1 vote, affirmed the rejection of the plan, but each of the Judges wrote an individual opinion. Circuit Judge Hutcheson affirmed on the ground that the plan was inequitable, but disagreed with Circuit Judge Sibley below on the question of statutory construction. Circuit Judge Russell affirmed, however, on all grounds given below; while Circuit Judge Holmes dissented. Thus, of the four Circuit Judges who considered the question of statutory power to require the merger prescribed by the Commission in that case, two found that the Commission does not have the power, and two found to the contrary. None of them even mentioned the earlier *dicta* in the *Callaway* and *Rock Island* cases as offering any guide whatever in the matter.

In the case at bar, however, the Court of Appeals relied on these cases as upholding the Commission's power to impose the consolidation here prescribed. The opinion contains no statement or analysis of the precise issue presented by the petitioners. It makes no reference whatever to the consistency clause of Section 77(f), which is the very crux of the matter. Moreover, the Court apparently confused this narrow question with some sort of unrelated

issue sought to be raised by the State of Texas (RCA, 23-4).

As noted above, the Commission itself is divided here as to the legality of the consolidation. Commissioner Splawn,[9] one of the three dissenting members, stated:

> "In presenting a plan of this nature, the majority undertakes to accomplish a result which we have no authority, on our own initiative, to bring about under section 5 of the act." (LII, 28631, 28685)

The division and confusion that has attended the disposition of this basic issue, its importance, here and in similar proceedings, involving administrative and judicial powers under two fundamental pieces of Federal railroad legislation, and the absence of any previous clear-cut adjudication demand a definitive analysis and ruling by the Supreme Court.

If the posture of the case permits, after disposition of the attached motion, such a ruling would be vital to the ultimate solution of the long-standing reorganization problems herein. For, if the 1949 plan is returned to the Commission for reconsideration and revision, the Commission and the parties should have the benefit of this Court's ruling as to whether the basic structure provided for in three attempted plans is suitable and lawful for a fourth attempt.[1]

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[9] Commissioner Splawn favors, as do the Independent Directors, the separate reorganization of each of the principal debtors in a manner that would preserve the pre-bankruptcy pattern of intercorporate relations. He believes this approach would: a) avoid the basic problem of illegality; b) simplify the problems of reorganization and equitable distributions; c) permit more satisfactory disposition of claims of security holders, including the stockholders; d) avoid any necessity of reorganizing the NOTM; e) involve no material loss of economies through consolidated operations; and f) avoid the issue raised by the State of Texas (L II, 28630-3, 28685).

[1] It may be noted that, if the District Court had disposed of this issue through the procedures sought in the Independent Directors' petition, referred to in preceding footnotes, the issue might have been so determined more than a year ago.

3. The provisions for control of the new company offend statutory standards and public policy.

The provisions of the 1949 plan are so contrived as to vest control of these vast railroad properties in a group of banks and insurance companies, already among the most powerful financial institutions of the country, despite the fact that their beneficial ownership of the properties is comparatively negligible (LII, 28607-12, 28753-4).

The overwhelming majority of the 15-man board of directors of the proposed new company, with assets of about a billion dollars, are to be selected by the following or their representatives:

	Title	Beneficial ownership of record in these proceedings
Metropolitan Life Ins. Co. The Prudential Life Ins. Co. Insurance Co. of North America New England Mutual Life Ins. Co. Provident Mutual Life Ins. Co. The Mutual Benefit Life Ins. Co. First Nat. Bank of the City of N. Y.	Group of Institutional Investors	Collectively about 9% (less than $2 million principal amount) of Mo. Pac. First & Refunding Mortgage Issue.
Manufacturers Trust Co.	Trustee for Mo. Pac. First & Ref. Issue[2]	None.
City Bank Farmers Trust Co.	Trustee for I-GN First Mortgage Issue[2]	None.
Empire Trust Co.	Trustee for Mo. Pac. Gen. Mortgage Issue[2]	None.
Chemical Bank & Trust Co.	Trustee for Mo. Pac. Secured 5¼% Issue[2]	None.
Bankers Trust Co.	Trustee for Mo. Pac. Convertible 5½% Issue[2]	None.

These banks and insurance companies are not strangers to one another. Most of them have been able to work in harmony throughout most of these proceedings. They

[2] The indenture would be scrapped upon reorganization. Whether the bank would have even a fiduciary role thereafter is uncertain.

have contributed more than any other parties to the formulation and support of all the attempted plans promulgated by the Commission in this case.

The plan contains devices that would tend to perpetuate their control of the whole billion-dollar enterprise, with all the social, economic and political power it commands. The real owners, that is, the future stockholders, would have a hard time gaining even minority representation, let alone control of their property. The terms of office are so staggered that only five members of the board would come up for election in any one year. Even with cumulative voting (by which Independent Directors are now elected), it would require holdings of at least 1/5 of the entire stock represented at a meeting to elect a single representative. Such holdings today can elect 1/5 of the board, or three directors. Under the plan, holders of a 3/5 majority of the stock voting, with consistent cohesion and persistent effort, would require three years to gain representation of their own choosing commensurate with their interests (LII, 28611-12, 28741, 28753-4).

The purpose of these arrangements, according to the Commission, is "to insure a degree of stability of management in the early years" (LII, 28611). But such provisions accomplish little to assure effective direction of the company's affairs by the lawful owners, whose customary, inherent and democratic right to elect annually an entire board of directors of their own choice is whittled here to the vanishing point. The control provided for here would be virtually unbreakable.

Whether arrangements as bold as these to secure control indefinitely of a vast railroad agglomerate for a group of banks and insurance companies, handling other people's money, meet the legal and equitable standards of Section 77 has never been authoritatively adjudicated by this Court. Whether a decree by an agency of the Federal Government creating such control is consistent with public policy has likewise never been determined by this Court. The Courts below scarcely adverted to the matter.

These questions are worthy of a most searching and thoughtful review.

4. The Commission disregarded actual earnings and val ›s.

Section 77(e) requires that valuations by the Commiss on be "determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts."

The actual earning record over the 12-year period, 1937-1948, the latest data before the Commission, showed as follows (LII, 28542):

	Missouri Pacific	Debtors Combined
Average annual earnings available for interest after Federal income taxes	$24,550,151	$31,438,502

The Commission disregarded these cold facts, and determined earning power on the basis of a forecast, with certain adjustments, of a "future normal year's earnings", which had been prepared more than a decade earlier, in 1936, by persons then employed by the Trustee in Bankruptcy. On this constructive and already discredited basis, the Commission came up with earning power figures that seem, as indeed they are, derived from some wholly imaginary operations. These figments, on which the plan and forfeitures are predicated, were 5½ million dollars short of reality in the case of the Missouri Pacific and almost 6 million dollars short for the debtors combined (LII, 28533-47):

	Missouri Pacific	Debtors Combined
I.C.C. estimate of a "future normal year's earnings available for interest after Federal income taxes"	$19,000,000	$25,450,000

This Court's previous decisions have indicated the considerable latitude of discretion enjoyed by the Commission, as the expert body delegated by Congress, to determine railroad capitalization under Section 77(e).

Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943)

Group of Institutional Investors v. *Chicago, Milwaukee, St. P. & Pac. R. Co.*, 318 U. S. 523 (1943)

But no Supreme Court case to date lays down the effective negative counterparts of these decisions, without which the true ambit and limits of the Commission's discretion remain uncharted. What the proper administration of Section 77 needs today and for the future (and this checkered case affords a prime opportunity therefor) is an articulated ruling by this Court that the Commission's discretion is not a license to disregard the simple arithmetic of past and present earnings.

In computing physical values, the Commission again employed a dusty artifact in preference to the actual financial records maintained in accordance with I. C. C. accounting regulations. The actual book value of Missouri Pacific assets, after substantial write-offs and tremendous gross capital expenditures during bankruptcy, was conservatively stated as of December 31, 1947, at more than $696,500,000 (LII, 28564). The Commission ignored these facts, however, in favor of a theoretical report by its Bureau of Valuation, made as of December 31, 1945, with certain adjustments. On this basis, and taking account of investments and other items, the Commission majority found reproduction cost less depreciation, in the case of the Missouri Pacific, would equal only about $602,000,000 (LII, 28510-13, 28553-64).

Even such grossly understated values were treated by the Commission in incomprehensible and inconsistent ways. In determining maximum permissible capitalizations for the principal debtors, considered separately, the Commission gave decisive weight to such values in the case of the NOTM (LII, 28561, 28658), but gave no apparent weight whatever thereto in the case of the Missouri Pacific (LII, 28563-4).

The opinions of the Courts below provide little more than a routine ratification of the foregoing erroneous, inconsistent and arbitrary determinations. A Supreme Court review is sorely needed to define further, and enforce adherence to, the statutory standards of Section 77.

5. No provision has been made to use cash with maximum effectiveness.

At the end of 1948, the debtor estates had cash and cash equivalents in excess of liberal working funds, as follows:

	Missouri Pacific	Debtors Combined
Cash and cash equivalents	$72,153,834	$90,566,144
Working capital	20,000,000	25,000,000
Excess	$52,153,834	$65,566,144

As shown in the next section, these surplus funds, though huge, have since been growing apace.

One of the objectives of the new law, Section 208 of the Bankruptcy Act, passed in 1948, was to avoid drastic reorganizations and achieve simpler business-like solutions by putting such excess cash accumulations to the most effective possible use, to wit, the prompt reduction of existing debt at a discount and the elimination of further interest accruals thereon (see p. 8 above).

Section 208(b) requires the Commission to take into account specifically:

> " • • • *cash* and net current assets, retirements and purchases of debt, including retirements and *purchases at a discount* that have been made or *that can reasonably be made*, • • • ." (Emphasis supplied).

This is not the casual language of ordinary enumeration. It reflects intimate knowledge of the crux of many railroad reorganization problems. The words were taken almost verbatim from an earlier bill, S. 1253, 79th Cong., 2nd Sess. The Senate Report on the earlier bill in 1946 is

therefore especially pertinent. That report, after a most impressive study, stated:

> "The primary problem of those in control of railroads during the last half-dozen years, and the primary problem at the present time, is, insofar as railroad finances are concerned, the prompt reduction of debt at a discount." (Sen. Rep. 1170, 79th Cong., 2nd Sess., p. 159)

Against the background of Congressional criticism which produced the new legislation, the language of Section 208(b) quoted above is an enunciation of national policy to provide for the use of surplus cash in railroad estates to purchase debt at a discount.

In the case at bar, the 1944 plan was returned to the Commission in 1947, because of changed conditions. The remand was not accomplished through Section 208(a)(1), which was still pending before the Congress, but the effect was identical. The new measure became the law of the land on April 9, 1948, with the express approval of the Interstate Commerce Commission.[3]

But more than a year later, on August 2, 1949, when the I.C.C. report in this case was issued, the Commission disregarded, and made no provision whatever to apply, the new reorganization principle. The I.C.C. report does not even mention the matter. Efforts by the petitioners to obtain provision for the immediate effective use of surplus cash were buried by the Commission in a general rejection of almost all their proposals.

The duty to use cash for such debt reduction is especially important, when any group of security holders, as in this case, are threatened with forfeiture, which could be avoided. After this duty had been made a matter of explicit policy in Section 208, the Commission's inaction was little short of a defiance of the will of Congress.

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[3] Sen. Rep. 897, 80th Cong., 2nd Sess., pp. 11-12.

Worse still than its inaction, the Commission in effect committed the surplus funds to indefinite idleness. The majority plan acknowledged the availability of over $35,000,000 of Missouri Pacific cash and over $4,800,000 of I-GN cash for the reduction of claims; but instead of providing that these funds be used promptly to acquire claims at available discounts, it provides that they be held until such time, if ever, as the plan may be consummated, and then applied to the reduction of certain claims taken at their full face amount (LII, App. D, opp. p. 28636).

Before the District Court, and again before the Court of Appeals, the Independent Directors persistently requested, as a claim for equitable treatment and relief under Section 77(e), the prompt use of the ever-mounting surplus cash to acquire debts at a discount. Their vital claim was virtually ignored.

The questions here are entirely novel, involving the application of policies enacted in Section 208. They are of crucial importance in the ultimate solution of these and other railroad reorganization proceedings.

If feasible, after action on the attached motion (a condition of all points urged herein) the Supreme Court should review these matters in order effectively to redirect the administration of Section 77 along the lines indicated by the Congress.

6. Changed conditions have utterly outmoded the plan.

Since the Commission's approval of the 1949 plan, national and international developments of such magnitude and impact have occurred that the plan has been rendered obsolete and more inequitable than ever.

As shown above, the actual average earnings, 1937-1948, had exceeded the figures on which the plan was predicated by about 5½ million dollars in the case of the Missouri Pacific and by about 6 million dollars for the debtors combined. The Commission plan was based on the theory that earnings would not only decline, but return perhaps to

something resembling pre-World War II figures. The very opposite has occurred.

The earnings in 1950 reduced the I.C.C. forecast to an absurdity. For the Missouri Pacific and for the debtors combined, on the basis of *existing capitalization*, 1950 earnings were at a level higher than in any year of their history, excepting only during 1942-1944:

	Missouri Pacific	Debtors combined
1950 earnings available for interest after Federal income taxes[4]	$35,928,237	$45,595,589
I.C.C. forecast on which the 1949 plan was predicated	19,000,000	25,450,000
Excess over I. C. C. forecast	$16,928,237	$20,145,589

Results for 1951 are incomplete, but total operating revenues for the first 9 months exceeded those for the ~~entire~~ same period ~~year~~ of 1950, and even with the Trustee's increasingly lavish maintenance policy, which has stepped up expenditures to an unusual degree, the earnings for the first 9 months were already about equal to those forecast by the Commission for an entire year.[4] And it is the last quarter which has usually been the period of highest earnings.

The amounts of cash and cash equivalents have likewise soared. The totals as of October 31, 1951, were as follows:

	Missouri Pacific	Debtors combined
Cash and cash equivalents[4]	$89,823,552	$104,336,048

Although they are not yet publicly available, the cash balances at the end of December, 1951, undoubtedly appear still higher. These amounts are of prime significance, especially in view of the new policy under Section 208 to use surplus cash for advantageous debt reduction. These growing funds hold the practical possi-

[4] According to an exhibit in the pending I. C. C. proceedings, prepared by the Trustee's Chief Accounting and Financial Officer.

bility of solving, in a relatively simple way, most, if not all, of the reorganization problems of the Missouri Pacific and of other railroads in the proceeding.

The physical values, according to the Commission's own Bureau of Valuation, have increased, in the case of the Missouri Pacific alone, by considerably more than $100,000,000 over the corresponding values found in the 1949 plan.[5] This increase, one of the most striking manifestations of the changes which have occurred, arises largely from the enormous sums ploughed back into the property for maintenance and improvements in recent years.[6]

With continuing huge Federal expenditures, geared to the United States' national and international commitments and policies, with business activity expanding rather than contracting, with railroad revenues mounting (increased freight rates have been allowed to meet increased costs of labor and materials), the trend is certainly not in accordance with that forecast in the 1949 plan. The new facts, even more than the facts up to the end of 1948, which were available to the Commission when the plan was promulgated, discredit the very foundations of the plan and render its terms and forfeitures more inequitable than ever.

On top of everything, the Trustee in Bankruptcy is making additions and betterments to the properties on a scale commensurate with the prospect of the continuing large volume of business.[6]

If the 1949 plan at any time had some unapparent virtue, it has wholly disappeared in the cold light of changed conditions. These developments require the return of the plan to the Commission and a new approach to the whole problem in accordance with the new statutory standards.

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[5] According to a Bureau Report in the pending I. C. C. proceedings.

[6] According to exhibits in the pending I. C. C. proceedings. According to still another, the investments alone of the Missouri Pacific have increased in value since the Commission's 1948 hearings by at least $12,000,000.

The changed conditions were disregarded by the Court below, despite the new policy on such matters embodied in Section 208.

Whereas the Supreme Court cases dealing with the Commission's discretion have ruled only affirmatively—upholding the Commission's discretion,—the cases on changed conditions have ruled only negatively. That is, only changed conditions that have *not* warranted reconsideration have been adjudicated.

> *Insurance Group Committee* v. *Denver & Rio Grande Western R. Co.*, 329 U.S. 607 (1948)
>
> *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448 (1943)
>
> *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U.S. 523 (1943)

This Court now should implement the new policy of Congress by establishing for reorganization proceedings the same type of landmark which it has plainly set in rate-making proceedings.

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U.S. 248 (1931)

In the absence of such an adjudication, the lower Courts may continue, as in this case, to proceed down a road marked "Confirmation", without regard to the legislative direction toward a different destination, where changed conditions have arisen. It would be salutary indeed if the Supreme Court would erect, in accordance with the intent of Section 208, a clear marker for the two-way guidance of present and future reorganization travellers.

But whether this Court has power so to act in this case is itself a most serious question. That preliminary issue is in part the subject of the attached motion.

CONCLUSION.

Subject to the matters raised in the attached motion, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioners.

January 10, 1952.

MOTION TO VACATE FORTHWITH THE OPINION AND JUDGMENT BELOW, TO DEFER CONSIDERATION OF ALL PETITIONS FOR WRITS WITH RESPECT THERETO AND FOR OTHER RELIEF.

1. On July 13, 1951, while the appeals were pending before the Court of Appeals, several parties filed in the District Court (where proceedings to confirm the plan had already been instituted) a petition under Section 208(a)(1) of the Bankruptcy Act, requesting a hearing and report by the Interstate Commerce Commission as to any changes, facts or developments since the Commission's approval of the plan, which were not provided for therein and which would warrant its reexamination, reconsideration or revision. On the same day, July 13, 1951, in accordance with the first sentence of Section 208(a)(5), the District Court entered an order, referring the petition to the I.C.C.

2. The second sentence of Section 208(a)(5) provides:

> "(a) *Notwithstanding any other provision of law*—
>
> * * * * * * * *
>
> (5) * * * Upon the filing of such petition with the court *all further proceedings for confirmation of the plan shall be suspended* pending disposition of the petition by the Commission and certification of its action thereon to the court." (Emphasis supplied)

3. Following, for convenient reference, is a timetable of the critical events involved herein:

October 3, 1950—Order entered by District Court, approving old plan.

May 10, 1951—Arguments heard by Court of Appeals on appeals from District Court's approval order.

June 25-28, 1951—Hearings held by District Court in proceedings to confirm old plan.

July 13, 1951—Petition filed in District Court under Section 208 to obtain I.C.C. determination of changed conditions affecting old plan.

July 13, 1951—Order entered by District Court referring 208 petition to I.C.C.

July 25, 1951—Order entered by I.C.C., fixing September 15, 1951 as date for filing replies to 208 petition.

August 14, 1951—Opinion and judgment entered by Court of Appeals, affirming approval of old plan.

September 15, 1951—Replies to 208 petition filed in I.C.C.

October 18, 1951—Petition filed in Supreme Court to extend time for filing petition for writ, in view of statutory suspension under Section 208(a)(5) and pendency of I.C.C. proceedings on changed conditions.

October 19, 1951—Motion filed in Court of Appeals to vacate its opinion and judgment in view of statutory suspension of proceedings as directed in Section 208 (a)(5).

October 20, 1951—Order entered by Mr. Justice Clark, extending time for filing petition for writ until January 11, 1952.

Nov. 27–Dec. 3, 1951—Hearings held by I.C.C. to determine changed conditions affecting old plan. Briefs thereon ordered to be filed by January 28, 1952.

4. On August 14, 1951, more than a month after the statutory injunction of Section 208(a)(5) had become effective, and while the petition under Section 208(a)(1) was pending, as it still is, before the Commission, the Court of Appeals nevertheless issued its opinion and entered judgment, affirming the District Court's approval of the 1949 plan.

5. The statutory injunction of Section 208(a)(5) suspended the proceedings in the Court of Appeals on July 13, 1951. Thereafter the Court was, and is, without power or jurisdiction to proceed further, until the Interstate Commerce Commission disposes of, and certifies its action on, the 208 petition. Decisions, judgments and actions of

any kind herein by the Courts to approve, ratify, further, or in any way confirm the old plan, at the very time when the Commission is considering the impact of changed conditions thereon, were on July 13 and still are suspended by operation of law. The decision below should never have been entered. Having been entered, perhaps in ignorance of the petition, it should have been vacated by the Court of Appeals itself, when the Court was first informed of the petition. Not having been so set aside, the opinion and judgment below should be vacated forthwith by order of this Court.

6. The whole content and purpose of Section 208 is to place upon the Interstate Commerce Commission the duty to review in the light of changed conditions any plan of reorganization that it has previously approved, where more than 18 months have elapsed since such approval.

Congressional Committees concerned with these matters had for a number of years been alarmed by the forfeiture of junior bondholders' and stockholders' interests, wiped out or threatened with being wiped out under Commission plans that had actually become outmoded by the time they were later posed for ratification in the District or appellate Courts.[1] Yet the Commission had felt that it lacked power, once it promulgated a plan, to volunteer to the Courts its view as to the effect of later developments upon the plan and its propriety.[2] Section 208, enacted April 9, 1948, was formulated and passed to meet these problems.[3]

7. Section 208(a)(1) provides:

> "* * * *it shall be the duty of the Commission,* upon petition of any party to the proceeding filed at any time

[1] E.g., see Sen. Rep. 925, 79th Cong., 2nd Sess., pp. 64-73; Sen. Rep. 1170, 79th Cong., 2nd Sess., pp. 8-21, 43-9; House Rep. 923, 80th Cong., 1st Sess., pp. 2, 8-9.

[2] E.g., see Sen. Rep. 925, supra, pp. 69-70; Sen. Rep. 1170, supra, pp. 61-2; House Rep. 923, supra, pp. 7-8.

[3] E.g., see Sen. Rep. 897, 80th Cong., 2nd Sess.; Conference Rep. 1603, 80th Cong., 2nd Sess.

> more than eighteen months after certification by the Commission to the court of the plan * * *, to report to the court * * * any changes, facts or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to re-examine or reconsider and, if necessary, to revise such plan * * *." (Emphasis supplied)

The purpose of this legislation is plainly stated in the report of the Senate Committee in charge of the measure:

> "But even more important, the recommended legislation would, for the first time, correct a situation which has heretofore prevented reconsideration of a reorganization plan years after it first had been promulgated. It does this by *placing the duty upon the Commission*, under prescribed conditions and circumstances, of reporting current facts and conditions surrounding a railroad which might alter or affect provisions of a reorganization plan prepared years before." (Sen. Rep. 897, 80th Cong., 2nd Sess., p. 2) (Emphasis supplied)

And again:

> "The Committee believes that the law should be clarified and the duty of the Commission made plain." (p. 7)

8. Assigning to the Commission the duty of determining changed conditions and their impact on the old plan, the Act deliberately imposes corresponding restraints upon the Courts. Until the Commission completes its assigned task, the law directs that "*all further proceedings* for confirmation of the plan shall be suspended." This injunction is ironclad. It is locked and double-bolted, "notwithstanding any other provision of law."

Congress thus insured that the *status quo* of the reorganization proceedings in the Courts would be preserved, while the Commission performs its statutory responsibilities. It prohibits any proceeding that would further, or add one jot of judicial sanction to, the old plan, while the Commission

is charged with reviewing that plan in the light of changed conditions.

The injunctive language employed is plain and broad enough to safeguard the Commission and the security holders against any judicial action whatever that might restrict, impair or even influence the free, unfettered performance of the Commission's prescribed duty.

9. It has been contended by the respondents that only proceedings technically designated "for confirmation" are suspended by the new law. Such a narrow interpretation, however, would defeat the whole substance and purpose of the Act. If this legislation is to have effect and not to be rendered futile, its terms must be honored according to their plain meaning that nothing may be done in the Courts which would hamper, interfere with or circumscribe the Commission's deliberations. To add judicial approval to the old plan, while the Commission is in the very act of determining changed conditions and their effect on that plan, flouts the law of Congress. Where, as in this case, issues on changed conditions have also been posed before the Courts, the attempted procedure would, in regard to such questions, open the door to inharmonious or even rival action simultaneously by Court and Commission.

Section 208 was not intended to permit any such unseemly spectacle of disorderly administration, but rather, in the words of the Senate Committee report, "to remedy this lack of liaison between courts and the Commission." As emphasized by the legislators: "The Committee does not intend that the plan shall become a football between the Commission and the Courts." (Sen. Rep. 897, 80th Cong., 2nd Sess., pp. 7, 8)

10. The legislative history of Section 208(a)(5) leaves no doubt about the scope of its injunction. Reports in both Houses used identical language to describe the procedural and jurisdictional consequences upon the filing of a petition under Section 208 with the Court:

"Such action apprises the court of the legal action taken under the new law and suspends *further action* by the court *involving confirmation* of the old reorganization plan." (Sen. Rep. 897, supra, p. 8; also Conference Rep. 1603, 80th Cong., 2nd Sess., p. 4) (Emphasis supplied)

11. It may be that the Court of Appeals was not promptly informed of the filing of the petition in this case.[4] Since the old plan was pending on July 13, 1951, in both the District and appellate Court, it would seem to have been proper for the petitioners under 208, or the District Court, officially to notify the Court of Appeals at once. If absence of official notice excused the Court of Appeals as late as August 14, 1951, however, the excuse vanished on October 19, 1951, when the Missouri Pacific filed a formal motion to vacate the opinion and judgment. Almost three months have passed, so far as the undersigned is informed, without action on that motion.

12. Every day that the opinion and judgment stand, they prejudice or threaten to prejudice the Commission's considerations. An appellate Federal Court decision, although improperly made, can hardly be altogether overlooked even by an expert administrative agency. The Commission task is arduous and trying enough,[5] without adding the stone of judicial prestige upon one side or another

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[4] Through a motion to postpone the argument below (RCA, 9), based largely on the ground that such a petition would be filed in or about July, 1951, and through references in oral arguments to the protection afforded by Section 208 as to changed conditions, the Court was aware that the filing of such a petition at the expiration of the 18-month statutory period was an imminent likelihood. The Court undoubtedly had informal notice of the petition through widespread press reports at the time it was filed, if not otherwise.

[5] The Commission has held hearings on the petition for six days and two nights, Nov. 27-Dec. 3, 1951, received 175 exhibits and testimony covering 1,262 pages. Briefs have been ordered filed Jan. 28, 1952, to be followed by an Examiner's Proposed Report, as to which the parties may file exceptions and perhaps make oral argument. Much is at stake in the Commission proceedings.

of its deliberations. Some damage to the Commission's assignment has undoubtedly already been done by the Court of Appeals decision. Such damage can be offset, if at all, only by wiping the decision off the books in a way that will leave the Commission path utterly cleared of prejudicial impediments. The protracted failure of the Court of Appeals to set aside the decision imposes upon this Court the duty to do so without more ado.

13. The same law that suspended proceedings in the Court of Appeals suspends also proceedings in this Court, except presumably to correct the improper exercise of power below. If this Court vacates the opinion and judgment of August 14, 1951, that would be, for the time being at least, an end of the matter—and a proper end. If this Court prefers to wait longer for the Court of Appeals to correct its own error, that would be less salutary, but perhaps not fatal. In any case, this Court should defer consideration of all petitions for writs relating to the judgment below, in deference to the statutory injunction and the pending Commission proceedings. It is possible that such proceedings may render some or all of the questions presented by the various petitioners moot.

WHEREFORE, the petitioners herein respectfully pray that this Court enter an order or orders:

a. Directing the Court of Appeals forthwith to vacate its opinion and judgment entered August 14, 1951; or

b. Deferring action on this motion until such time as the Court of Appeals acts upon the motion heretofore, on or about October 19, 1951, made by the Debtor to vacate said opinion and judgment; and

c. In any event, deferring consideration of all petitions for writs of certiorari with respect to the Court of Appeals judgment of August 14, 1951, pending disposition by the Interstate Commerce Commission of the petition heretofore, on July 13, 1951, filed under Section 208(a)(1) of

the Bankruptcy Act and further pending certification by the Commission of its action on said petition to the appropriate Court.

d. Granting such other and further relief as may be just and equitable.

Respectfully submitted,

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Counsel for John V. Farwell, III, Bolton Sullivan and Cary N. Weisiger, Jr., Independent Directors of the Missouri Pacific Railroad Company.

January 10, 1952.

Office - Supreme Court, U. S.
FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 527.

JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

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Dated: New York, N. Y., February 7, 1952.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

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JOHN V. FARWELL, III, BOLTON SULLIVAN and CARY N. WEISIGER, JR., Independent Directors of the Missouri Pacific Railroad Company,

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GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

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BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832. The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8 Cir. 1951). The Fourth and Fifth Supplemental Reports

* A list of abbreviations and references used in this brief is on page ii, *supra*.

of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). Respondent submits that petitioners are not parties and therefore this petition should be dismissed for that reason.

Questions Presented.

1. Whether this petition should be dismissed because Petitioners are merely three individuals, minority members of the board of fifteen (15) directors of one of the Debtors and have been denied leave to intervene in this reorganization proceeding before the District Court.

This is the only question raised by this petition which is not presented by some of the other four petitions of actual parties requesting a review of the decision of the United States Court of Appeals for the Eighth Circuit affirming the approval of the Plan of Reorganization of the Missouri Pacific Railroad System.*

2. Whether the District Court performed the duties imposed upon it by Section 77(e) of the Bankruptcy Act, 11 U. S. C. §205, when it approved the Plan of Reorganization for the Missouri Pacific System and certified to it by the Interstate Commerce Commission.

Respondent respectfully refers this Court to its brief in No. 525, *Alleghany Corporation* v. *Group of Institutional Investors etc.,* for its argument on this question.

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* Nos. 524, 525, 526 and 528 (October Term, 1951).

3. Whether the Interstate Commerce Commission, acting under Section 77 of the Bankruptcy Act, 11 U. S. C. §205, has the power to provide in a plan of reorganization for the merger or consolidation of the three principal debtors into one corporation where one of the debtors owns about 95% of the capital stock of the second which in turn owns all the capital stock of the third, and the three have been operated on a unified basis for the last 28 years.

Respondent respectfully refers this Court to its brief in No. 526, *Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee* v. *Group of Institutional Investors, et al.*, for its argument on this question.

4. Whether the filing of a petition with the District Court pursuant to 11 U. S. C. §208(a)(1) which suspends "all further proceedings for confirmation of the plan" also suspends the proceedings for approval of a plan of reorganization.

Petitioner has also raised this question in the form of a "motion to vacate forthwith the opinion and judgment below, to defer consideration of all petitions for writs with respect thereto and for other relief" (Petition, pp. 25-32). Respondent respectfully refers this Court to its brief in No. 528, *Missouri Pacific Railroad Company* v. *Group of Institutional Investors etc.*, for its argument on this question.

Statement.

This statement will be limited to facts pertinent to question No. 1—whether this petition should be dismissed because petitioners are merely a minority of the Board of Directors of one of the Debtors and have been denied leave

to intervene in this reorganization proceeding before the District Court.

Petitioners are three of fifteen members of the Board of Directors of one of the Debtors, the Missouri Pacific Railroad Company (hereafter called MOP). The majority of the Board has not authorized these three to take any action with respect to these reorganization proceedings. In fact, MOP is separately represented in these proceedings and has petitioned this Court for a writ of certiorari (October Term 1951, No. 528). The Petitions of MOP and others who are properly parties in this case present all the questions which this minority of MOP's Board of Directors present in their Petition.

In 1947 the so-called "Independent Directors" were granted permission by the Interstate Commerce Commission to intervene in the proceedings before the Commission, but they have never been granted leave by the District Court to intervene generally, or as individuals, or as a group pursuant to Rule 24 of the Federal Rules of Civil Procedure. On the contrary, on February 24, 1948, they petitioned the District Court for permission to intervene in these proceedings. A copy of that petition is annexed hereto as Appendix A. On April 9, 1948, the following entry was made in the District Court's docket:

> "Separate petition of John V. Farwell III *et al,* Independent Directors of Missouri Pacific R. R. Co., and Mord Bogie, *et al,* constituting a Protective Committee for holders of Missouri Pacific R. R. Co. 5¼% Secured Serial Bonds, for leave to intervene, argued, submitted and said separate petitions denied."

The District Court has not taken any action modifying this order of April 9, 1948, which denied the "Independent Directors" leave to intervene.

Argument.

Petitioners invoked the jurisdiction of this Court only under 28 U. S. C. §1254 (1). That section provides that:

> "Cases in the courts of appeals may be reviewed . . . (1) by writ of certiorari granted upon the petition of any party. . . ."

Petitioners were never admitted as parties to the proceedings for approval of the Plan in the District Court. There is nothing in the Bankruptcy Act which gives a single director or a group of three minority directors any right to participate as a party in a reorganization proceeding. Section 77(c) (13), 11 U. S. C. §205 (c) (13) gives a "right to be heard on all questions arising in the proceedings" to

> "The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding."

Individual directors, independent or otherwise, do not fall into any of these categories.

As Petitioners are not parties, they are not entitled to invoke the jurisdiction of this Court under Section 1254(1). Cf. *Ex Parte In the Matter of Leaf Tobacco Board of Trade of the City of New York*, 222 U. S. 578 (1911); *Louisiana* v. *Jack*, 244 U. S. 397 (1917); *In re Van Sweringen Corporation*, 180 F. 2d 119 (6 Cir. 1950); *In re Phoenix Dress Co.*, 131 F. 2d 726 (7 Cir. 1942).

Conclusion.

It is respectfully submitted that this Petition for Writ of Certiorari should be dismissed or denied.

Respectfully submitted,

Leonard P. Moore,
Clair B. Hughes,
Alan S. Kuller,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

Chadbourne, Parke, Whiteside,
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25 Broadway,
New York 4, N. Y.,
Of Counsel.

Dated: New York, N. Y., February 7, 1952.

Appendix A.

IN THE

DISTRICT COURT OF THE UNITED STATES,

EASTERN DIVISION,

EASTERN JUDICIAL DISTRICT OF MISSOURI.

IN THE MATTER
of
MISSOURI PACIFIC RAILROAD COMPANY,
Debtor.

PETITION TO INTERVENE.*

Come now John V. Farwell, III, Bolton Sullivan and Donald D. Wilson, through their attorneys, Lucien Hilmer and John F. Davis, and respectfully petition this court that they be permitted to intervene as parties in the above entitled proceeding. In support thereof they respectfully show:

1. John V. Farwell, III, Bolton Sullivan and Donald D. Wilson are directors of the Debtor, Missouri Pacific Railroad Company, having been last elected by the stockholders at the annual meeting held on May 13, 1947.

2. On October 24, 1947 said John V. Farwell, III, Bolton Sullivan and Donald D. Wilson were, by order of the Interstate Commerce Commission, permitted to intervene as parties in the reorganization proceedings of the Missouri Pacific Railroad Company pending before said Commission. On January 17, 1948 petitioners filed with the Interstate Commerce Commission on the Clerk of the United States

* Denied April 9, 1948.

District Court, Eastern Judicial District of Missouri, a plan of Reorganization for Missouri Pacific Railroad Company, New Orleans Texas & Mexico Railway Company and International-Great Northern Railroad Company.

3. The provisions of Section 77 of the Bankruptcy Act respecting reorganization of railroad companies require proceedings in the District Court as well as before the Interstate Commerce Commission. Moreover, this court considers and acts on various matters in the administration of the several estates which have an important bearing on any proposals made for reorganization.

WHEREFORE, your petitioners pray:

a. That your petitioners be permitted to intervene generally in this proceeding and become parties thereto;

b. That your petitioners have such other and further relief as may be just and proper.

Respectfully submitted,

JOHN V. FARWELL, III,
BOLTON SULLIVAN,
DONALD D. WILSON,
Petitioners,

By their counsel:

/s/ LUCIEN HILMER,
LUCIEN HILMER,

/s/ JOHN F. DAVIS,
JOHN F. DAVIS,

HILMER AND DAVIS,
1700 I Street, N. W.,
Washington 6, D. C.

February 24, 1948.

(Verification omitted.)

FILED
JAN 11 1952
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 528

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BURTON K. WHEELER
EDWARD K. WHEELER
ROBERT G. SEAKS
Counsel for Missouri Pacific Railroad Company

January 1952

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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In The

Supreme Court of the United States

October Term, 1951

No. .....

Missouri Pacific Railroad Company, *Petitioner*

v.

Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Missouri Pacific Railroad Company respectfully prays that a writ of certiorari be issued to review an order of the United States Court of Appeals for the Eighth Circuit entered in this cause on August 14, 1951, affirming an order of the United States District Court for the Eastern District of Missouri, Eastern Division, overruling all objections against and approving a Plan of Reorganization for Missouri Pacific Railroad Company, and its subsidiary railroads, certified to the District Court by the Interstate Commerce Commission pursuant to Section 77 of the Bankruptcy Act.

OPINIONS BELOW

The opinion of the Court of Appeals (C. R. 20-44) * is reported in 191 F. 2d 265. The opinion of the District Court (R. 915-944) is reported in 93 F. Supp. 832. The immediately pertinent reports of the Interstate Commerce Commission in its Finance Docket No. 9918, Missouri Pacific Railroad Company Reorganization, are reported in 275 I. C. C. 59 (D.R. 28469-28636) and 275 I.C.C. 203 (D.R. 28639-28686).

JURISDICTION

The order of the Court of Appeals was entered August 14, 1951 (C.R. 46-49). By order of this Court, dated October 30, 1951, the time for filing a petition for a writ of certiorari by this Petitioner was extended to and including January 11, 1952. The jurisdiction of this Court is invoked under Section 47 of the Bankruptcy Act (11 U.S.C. § 47) and Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED

(1) Whether a court of appeals may properly render an opinion and enter an order affirming a district court's approval of a railroad reorganization plan certified by the Interstate Commerce Commission under Section 77

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* References to the record are in the following form: C. R. refers to the printed record in a separate pamphlet entitled "Proceedings in United States Court of Appeals, Eighth Circuit"; R. refers to the printed record in Appeals Nos. 14,264-14,274 in the Court of Appeals; D. R. refers to that part of Vol. LII of the District Court Record containing the Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission and its Fifth Supplemental Order; O. R. refers to the printed record before the Court of Appeals in Appeals No. 12,130-12,133, involving the Commission's 1940 plan of reorganization for the debtors.

of the Bankruptcy Act, at a time when the Commission, pursuant to Section 3 of the Act of April 9, 1948, is determining whether changes and developments require its reconsideration and possible revision of the plan, and such Act directs that "all further [judicial] proceedings for confirmation of the plan shall be suspended" pending such Commission determination.

If the answer to the foregoing question is affirmative,—

(2) Whether the Court of Appeals properly held that the Commission's conclusion as to the maximum allowable capitalization of a reorganized railroad system is "binding" upon the courts;

(3) Whether a maximum allowable capitalization for a reorganized railroad system, fixed by the Commission in 1949 on the basis of capitalizing a "normal-year earnings forecast" made in 1936, may be sustained when more than a decade of experience has established that the forecast was grossly erroneous, and included such assumptions as that the years 1930 and 1931 were years of "normal" economic activity and that gross operating revenues of the railroad would be only 40% of what they currently are; and

(4) Whether the Court of Appeals properly sustained a Commission finding that the common stock of Missouri Pacific Railroad Company is worthless when its current earnings are $26 per share.

STATUTES INVOLVED

Section 3 of the Act of April 9, 1948 (62 Stat. 167, 11 U.S.C. § 208) provides in pertinent part:

(a) Notwithstanding any other provision of law—

(1) with respect to any plan of reorganization or modified plan of reorganization approved by the

Interstate Commerce Commission under the provisions of section 205 of this title, subsequent to April 9, 1948, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a United States court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 205 of this title. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

* * * *

(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court.

Subsection (e) of Section 77 of the Bankruptcy Act (47 Stat. 1474, 49 Stat. 911, 49 Stat. 1969, 53 Stat. 1406; 11 U.S.C. § 205(e)) provides:

> (e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such

class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such

rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The

value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

STATEMENT

On March 31, 1933, the Missouri Pacific Railroad Company filed a petition in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization pursuant to the provisions of Section 77 of the Bankruptcy Act. Similar petitions were filed in the same court by the New Orleans, Texas & Mexico Railway Company, the International-Great Northern Railroad Company, and some twenty-two other railroad corporations, a majority of whose capital stock is owned by Missouri Pacific Railroad Company either directly or indirectly through the medium of its two principal subsidiaries named above. (O.R. 299-300.)

The "Missouri Pacific System" (a collective term used throughout the proceedings to describe the Missouri Pacific Company, the New Orleans, the International and their respective debtor subsidiaries) comprises about 9,556 miles of owned railroad and 10,218 miles of operated railroad, serving the states of Missouri, Kansas, Colorado, Arkansas Louisiana, Texas, and parts of Illinois, Nebraska, and Oklahoma. (O.R. 302.) The *Missouri Pacific*, and its directly operated subsidiaries, owns about 6800 and operates about 7200 miles of railroad.

Its lines extend from St. Louis, its eastern terminus, through Kansas City to Pueblo where they connect with those of the Denver & Rio Grande Western. Other lines extend southerly from St. Louis through Memphis to New Orleans, and through Little Rock to Texarkana where they connect with the Texas & Pacific Railway Company, a subsidiary of Missouri Pacific which is not a debtor in this proceeding. The Texas & Pacific Railway Company, owning about 1800 miles of railroad, operates a main line westerly from Texarkana through Dallas and Fort Worth to El Paso. (O.R. 302-303.)

The *New Orleans* (here and hereafter used to describe the New Orleans, Texas & Mexico Railway Company and its subsidiaries other than International-Great Northern Railroad Company) owns about 1623 and operates about 1860 miles of railroad. Its lines extend from New Orleans to Brownsville, Texas, paralleling somewhat inland the Gulf seaboard, and from Corpus Christi to San Antonio where connection is made with the International-Great Northern Railroad Company. (O.R. 305-308.) The *International* (International-Great Northern Railroad Company and its subsidiaries) owns about 1100 and operates about 1155 miles of railroad. Its lines extend from a point on the Texas & Pacific Railway Company's main line near Texarkana southerly to Houston, and southwesterly through Austin and San Antonio to Laredo, and from Houston through Waco to Fort Worth, where it connects with the Texas & Pacific Railway Company's main line. (O.R. 308-309.)

The petitions of the several debtor railroads were approved by the District Court as properly filed and duly referred to the Interstate Commerce Commission. The Commission, after hearing and following consideration of various proposed plans filed with it, issued a report on January 10, 1940 (239 I.C.C. 7, slightly modified on petition in 240 I.C.C. 15). The plan of reorganization for-

mulated by the Commission was approved by the District Court (*sub nomine, In re Missouri Pacific R. Co.,* 39 F. Supp. 436) and was pending on appeal before the Court of Appeals for the Eighth Circuit when this Court rendered its decisions in *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448, 63 Sup. Ct. 692, and *Group of Institutional Investors* v. *Chicago, Milwaukee & St. Paul R. Co.,* 318 U. S. 523, 63 Sup. Ct. 727. The case was remanded to the District Court for its reconsideration in the light of this Court's opinions in the *Western Pacific* and *St. Paul* cases. By the time (July 29, 1943) when the District Court rendered its second opinion, the Missouri Pacific System's greatly increased earnings had resulted in cash accumulations of $125,000,000. The District Court accordingly referred the plan of reorganization back to the Commisssion to consider whether adequate compensation had been allowed bondholders for loss of seniority rights and "for the further reason that changed conditions arising since the formulation of the Plan make it desirable that the Commission should have further opportunity to consider whether the Plan as formulated can be improved upon at this time." *In re Missouri Pacific R. Co.,* 50 F. Supp. 936, 943.

The Commission, after further hearings, issued a Supplemental Report on July 4, 1944. (257 I.C.C. 479, slightly modified on petition, 257 I.C.C. 745.) The Commission's second Plan of Reorganization was approved by the District Court (64 F. Supp. 64) but its order of approval was vacated and set aside without opinion by the Court of Appeals for the Eighth Circuit and the cause remanded to the District Court with directions to return the plan to the Commission for further consideration and recommendation. *Wright* v. *Group of Institutional Investors,* 163 F. 2d 1022.

The Commission, following further hearings held in 1948, issued a Fourth Supplemental Report dated Au-

gust 2, 1949, formulating a further plan of reorganization (275 I.C.C. 59, modified slightly on petition decided December 29, 1949, 275 I.C.C. 203). The Plan thus formulated was approved by the District Court in an order overruling all objections and denying all claims for equitable treatment. (*In re Missouri Pacific R. Co.*, 93 F. Supp. 832, opinion rendered July 29, 1950, as amended October 3, 1950.) The Court of Appeals held that the District Court's approval of the Plan was without error, rendering its opinion and entering its order to that effect on August 14, 1951 (191 F. 2d 265).

On July 11, 1951, or while appeals from the District Court were pending before the Court of Appeals, the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company filed a petition requesting that the Commission report any changes, facts, or developments which had occurred since the Commission's approval of the Plan of Reorganization which had not been provided for in the Plan and which in the opinion of the Commission made it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise the Plan in order to assure that, if put into effect, it should then in the opinion of the Commission be fair and equitable and in the public interest and compatible with relevant provisions of law. Such petition was filed pursuant to the provisions of Section 3 of the Act of April 9, 1948 (62 Stat. 167, 11 U.S.C. § 208) which provides, broadly speaking, that any party to a plan of reorganization, by petition filed more than eighteen months after certification to the court by the Commission of a plan of reorganization, may require the Commission to report to the court whether there have been such changes or developments as to necessitate reexamination, reconsideration and possible revision of the plan. The petition set forth the Group's opinion that there had been no significant changes or developments since the Commission's certifica-

tion of the Plan of Reorganization on January 7, 1950, but alleged as the Group's reason for filing its petition that it would prevent possible delay by your present Petitioner in filing a petition under the Act of April 9, 1948. The Group's petition was, on July 13, 1951, referred by the District Court to the Commission.

The Act of April 9, 1948, provides in Section 3(a)(5) that, upon the filing of a petition as permitted, "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court." Notwithstanding the filing of the Group's petition and this provision of law, the Court of Appeals subsequently on August 14, 1951, rendered its opinion and entered its order affirming the order of the District Court. Thereafter, on October 18, 1951, your present petitioner filed with the Court of Appeals its motion,* duly calling attention to the foregoing provision of law and praying that the Court's judgment of August 14, 1951, be vacated and set aside (and its supporting opinion withdrawn) as having been entered (and rendered) at a time when Section 3 of the Act of April 9, 1948, directed a suspension of proceedings. The Group filed an opposition to such motion dated October 22, 1951, to which your present Petitioner responded on October 26, 1951. The Court of Appeals has failed to act upon this motion.

Plan of Reorganization

As of January 1, 1948, the effective date of the Plan of Reorganization certified by the Commission (D.R. 28477-28480), the Commission found that there were claims against the Missouri Pacific System outstanding in the hands of the public as shown by the following table (D.R. 28474-28475):

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* Since this motion is not included within the printed record on appeal, it is reproduced as Appendix A to this Petition.

	Claims as of Jan. 1, 1948		
Missouri Pacific Company	*Principal*	*Interest*	*Total*
Equipment obligations	$16,586,567		$16,586,567
First and refunding bonds	223,190,500	$88,682,990	311,873,490
General mortgage bonds	49,339,421	29,274,723	78,614,144
Secured serial 5¼% bonds	11,245,000	8,904,634	20,149,634
Convertible 5½% bonds	45,493,000	37,948,744	83,441,744
Divisional & subsidiary company bonds	5,988,000	1,360,574	6,348,574
Preferred stock	70,190,100		70,190,100
Common stock	81,314,343		81,314,343
Total	502,346,931	166,171,665	668,518,596
New Orleans			
Equipment obligations	2,720,960		2,720,960
First mortgage bonds	40,615,900	602,620	41,218,520
Stock (held by public)	859,800		859,800
Total	44,196,660	602,620	44,799,280
International			
Equipment obligations	1,867,137		1,867,137
First mortgage bonds	28,750,000	13,685,000	42,435,000
Adjustment mortgage bonds	13,807,700	14,498,085	28,305,785
Total	44,424,837	28,183,085	72,607,922
System Total	590,968,428	194,957,370	785,925,798

The Commission found, in briefest summary, that all the debtors should be reorganized as a single system, and that the new system capitalization should not exceed about $612,000,000, inclusive of $21,000,000 of equipment obligations but exclusive of (1) $498,000 in bonds of a subsidiary building company and of (2) any new securities issued in satisfaction of claims of unsecured general creditors (D.R. 28556). (The claims of unsecured general creditors totaled $1,825,617, of which $447,011 represented allowed claims and the remaining $1,378,606 represented unliquidated claims (D.R. 28477).)

The Commission further found that this authorized total system capitalization should be reflected by the following capital structure, bearing annual charges as shown (D.R. 28565):

Fixed-interest debt		*Principal amount*	*Annual charges*
quipment obligations (as of Jan. 1, 1948)		$21,174,664	$423,493 (@ 2%)
irst-mortgage 4-percent bonds:			
Series A	$40,615,900.00		
Series B	83,409,899.50		
Series C	83,409,899.50		
		207,435,699	8,297,428
Total fixed-interest debt		228,610,363	8,720,921
Contingent-interest debt			
eneral-mortgage 4½-percent income bonds:			
Series A	143,594,632		
Series B	26,092,850		
		169,687,482	7,635,936
Total all debt		398,297,845	16,356,857
Stock			
percent preferred stock ($100 par value)		100,107,904	5,005,395
o-par common stock (at $100 per share):			
Class A ($5 dividend before class B dividend)	83,444,732		
Class B	30,081,471		
		113,526,203	
Total stock		213,634,107	5,005,395
Total capitalization		611,931,952	21,362,252 (before dividends on common stock)

The core of the Commission's Plan involves complete satisfaction of all creditor claims, partial satisfaction of preferred stockholders, but a determination that "the equity of the holders of Missouri Pacific common stock is without value and that such holders should not participate in the reorganization" (D.R. 28593). Preferred shareholders are allocated a total participation of $30,000,000 face amount in new System common stock, or, since preferred stock was outstanding as of January 1, 1948, in the par amount of $70,190,100, about $3 face amount of new common stock for each $7 par amount of

old preferred stock held (D.R. 28592). All secured creditors of the three principal debtors were allocated cash or securities in the new proposed company equal or exceeding in face amount the full amounts of their claims and in a manner according with their respective priorities as found by the Commission (D.R. 28575-28592).*

In arriving at the figure of $612,000,000 as the maximum permissible capitalization of the reorganized System, the Commission determined that "the greatest weight should be given to the past and prospective earnings of the system in order that ample coverage of fixed interest may be assured in years of relatively lean earnings, and all interest as well as a return to stockholders be reasonably assured in more favorable years" (D.R. 28553). Averaging total interest charges and prospective dividends (found to be slightly under 4¼ percent for mortgage bonds, $5 dividend annually for preferred stock, and at least 6% for common stock during periods of reasonably good earnings), the Commission concluded that about 4½ percent was a proper figure to use in capitalizing earnings (D.R. 28553-28554). On this basis, a capitalization of average annual System "earnings" (i.e., earnings available for interest payments after federal income and excess-profits taxes) for various periods would be as follows (D.R. 28554):

Period	*Length in years*	*Average earnings*	*Capitalization*
1937-41	5	$15,455,508	$343,455,733
1942-1948	7	42,854,927	952,331,711
1937-1948	12	31,438,502	698,633,378
1946-1948	3	34,656,736	770,149,600

* We do not reproduce here the scheme of allocation of proposed new securities to existing security holders of the debtors. The allocation plan is presented in tabular form in Appendix "D" facing D. R. 28636. The gravamen of Petitioner's complaint is not the allocation of securities within the framework of the capitalization proposed, but the gross inadequacy of the capitalization.

The Commission, while stating that its conclusion was based on the "entire record" (D.R. 28556), obviously from its preoccupation with the trustee's "normal-year forecast" accorded great and almost conclusive weight to this factor. In the 1936 hearings upon which the Commission founded its original report in January 1940, the trustee forecast that System earnings available for interest in a normal year would be $22,059,052 (a figure reached by the Commission after adjusting the trustee's slightly lower figure for items which he omitted from consideration) (D.R. 28533). The trustee's forecast was not changed by the trustee at the further hearing in 1943 prior to the Commission's 1944 Supplemental Report and its formulation of the second plan of reorganization (*Ibid.*). Nor was its essential validity reexamined at the 1948 Commission hearing, although the trustee's chief executive officer testified that the development of the citrus industry and of the chemical industry in the Gulf area were of permanent nature, were unforeseen by the trustee when he made his forecast, and would result in additional earnings sufficient to raise the normal-year forecast to $26,622,731 (D.R. 28541, as corrected at D.R. 28654-28655). On this basis, the Commission adjusted the trustee's normal-year forecast to $25,450,000 from the $22,059,052 figure used in its 1944 (and also in its 1940 report), remarking without elaboration that this adjustment would sufficiently reflect "any economies of operation resulting from improvements to the debtor's properties since 1944 as well as improved traffic possibilities since that date" (D.R. 28545). Capitalization of the trustee's normal-year forecast yields a figure of $565,555,555 (D.R. 28554).

The trustee's normal-year forecast, when first made in 1936, was predicated on estimated total railway operating revenues of $129,140,357 (D.R. 28533; O.R. 776). It included the assumption that the years 1930 and 1931

were "pretty close to normal." (O.R. 1140.) The forecast, as used by the Commission in 1949, was adjusted upward by only 15% and then only to reflect partially the development of two industries, notwithstanding that total railway operating revenues in 1948 were $301,189,433, or 233% of the normal-year estimate (D.R. 28532) and notwithstanding the yawning gulf between 1949 and 1930-1931. The Commission found that "the record indicates that the average annual volume of traffic and gross operating revenues of the debtors in the future will be larger than the average for the 5 years or 10 years immediately preceding the war" but considered that increased costs of labor and materials might at least offset the increased gross revenues (D.R. 28542).

The Commission, having given "greatest weight" to hypothecation of earnings in arriving at an allowable System capitalization, necessarily gave some lesser and indeterminate weight to valuation figures. Its general philosophy and approach to the problem of determining maximum permissible valuation is, however, apparent in its treatment of valuation data. The Commission's Bureau of Valuation found that the original cost of the properties of the System, as of December 31, 1945, was $640,322,464; that the cost of reproduction new was $726,420,943; and that the cost of reproduction new less depreciation (but inclusive of the value of land and an allowance of $14,475,932 for working capital) was $540,096,823. In arriving at reproduction cost values, the Bureau of Valuation used prices purportedly as of December 31, 1945. It reported that, if 1946 prices were desired, it would be necessary to increase the 1945 prices by 15 percent, or to $639,463,286 (D.R. 28512-28513).

In fact, however, December 31, 1945 prices were not applied but reproduction costs were computed primarily on the basis of prewar prices. This important fact is substantially obscured in the Commission's Report and

the District Court was misled into believing that the Commission had determined reproduction cost on the basis of 1946 prices (R. 921). The Commission reported that "period prices as of December 31, 1945, were applied in determining cost of reproduction of the Missouri Pacific and the other debtors" but that "*these prices are based on an investigation of prices over a period of years,* giving appropriate consideration to the usual transitory nature of inflated prices occurring because of labor, material, and food shortages during a war or postwar period. *Primary consideration was given by the Bureau to prices prevailing during the immediate prewar period,* together with a long-term forecast of future price trends." (D.R. 28510, emphasis added.) In other words, the Commission did not use 1945 actual prices, but such prices as it considered would have prevailed in 1945 had they been more like what they were in prewar years and less like what they actually were in 1945. Had the Commission used actual 1946 prices, its reproduction cost less depreciation figure would have been about $800,000,000. (*Infra,* p. 42).

The Commission concluded that "for consideration in fixing permissible capitalization of the debtors, the period prices as of December 31, 1945, applied by the Bureau in determining cost of reproduction and cost of reproduction less depreciation should be increased 15 percent thus reflecting period prices as of 1946 * * *." It rejected the view that estimates respecting reproduction cost should reflect a price level more in accord with current realities than assumed 1945 prices, which were really prewar prices, increased by only 15 percent to yield 1946 prices. It said (D.R. 28510-28511):

> "In our opinion, it is not reasonable to assume that the current dislocation of the economy of the United States due to the war will prevail for the indefinite future. Adoption in the future of new and improved

> methods of performing work and substituted use of new or equally efficient but less costly materials than those formerly used also may offset to some extent over a period of time increasing labor and material costs."

In one respect, the Commission considered its valuation data controlling and used it to decrease the otherwise permissible System capitalization. The capitalization of the New Orleans, reached by capitalizing the trustee's normal-year forecast at 4½ percent, would have been $104,444,444. The Commission thought that "clearly, the maximum capitalization of the New Orleans as a separate company should have a reasonable relationship to the value of its property." (D.R. 28561.) Its reproduction cost new less depreciation (after minor adjustments) being $81,541,286 and its balance sheet showing total assets of $96,836,047, the Commission concluded that upon the entire record the capitalization of the New Orleans, considered as a separate company, could not exceed $83,700,000 (*Ibid.*).

The Commission found that "in general, the System lines are in excellent condition with only a nominal amount of deferred maintenance existing." (D.R. 28555.) It further found that past and contemplated dieselization of power "have been resulting and will continue to result in important economies of operation" (*Ibid.*). From the initiation of bankruptcy proceedings in 1933 through 1947, gross additions and betterments of $170,018,753 had been made to the debtor's properties (D.R. 28544). "While additions and betterments do not always result either in obtaining additional traffic or in more economical operation, it is probable that a considerable part of the sums expended by the trustee has had that result." (*Ibid.*)

Other factors, highly favorable for the future outlook of the Missouri Pacific System, were apparent from the

Commission's Report but were not influential in its final determination. The industrial development of the region served by the System, reserved for detailed discussion, *infra* p. , was enormous. A comparison between the claims against the System as of January 1, 1943 (the effective date of the Commission's superseded plan) and as of January 1, 1948, is also impressive. Total claims against the System on the earlier date of $831,389,759 were reduced as of the later date to $785,925,798 (D.R. 28474-28475). This reduction was effected even during a period when additions and betterments were being made at a high rate, and large cash amounts were accumulating in the trustee's hands. Between the two dates in question, the Missouri Pacific Company repaid (1) notes owing to the Reconstruction Finance Corporation which, together with interest, totalled $33,053,142; (2) a bank debt, together with interest, of $8,472,174; (3) a debt of $2,074,103 to the Railroad Credit Corporation; and (4) division bonds in the amount, together with interest, of $24,385,653. The New Orleans had discharged its income-mortgage bonds in an amount, together with interest, of $2,501,231, and had paid off $8,072,830 in back interest on its first mortgage bonds; and the International paid off a debt of $416,703 to the Railroad Credit Corporation (*Ibid.*). While this degree of debt reduction was being effected, cash so accumulated in the hands of the trustee that, as of April 30, 1949, he held for the System cash or cash equivalents of $82,617,042 (D.R. 28575).

While the Commission noted a few such favorable factors, it could not have accorded them any weight since it adjusted the 1936 forecast of earnings by less than the amount of earnings being realized by the citrus and chemical developments. Its ultimate finding as to permissible capitalization of $612,000,000 is only 9% more than the permissible capitalization of $560,000,000 which it found in 1940 and reaffirmed in 1944 (R. 921). In

summary, it placed ultimate reliance for justification of this permissible capitalization on a forecast of normal-year earnings made in 1936 and only slightly increased in 1949 to reflect a portion of the earnings accruing from the development of citrus farming and the chemical industry along the Gulf Coast. The heart of its reasoning is contained in this passage (D.R. 28546):

> "In arriving at the above-recommended normal-year forecasts, the constantly increasing cost factor as related to increasing traffic volume has been considered *as well as a belief that business activity from 1946 through 1948 * * * has been at an unusually high level, which it is not reasonable to assume will be maintained uniformly in the future.*" [Emphasis added.]

Commissioner Alldredge, joined by Commissioner Aitchison, dissented in the belief that "the majority has been overly conservative in its estimate of future earnings of the Missouri Pacific system," and because "there are good reasons for believing that in the situation here presented future performance will be substantially better than the peacetime record of the past" (D.R. 28633-28634). They thought that, if post-1945 conditions would continue, an increase in allowable capitalization sufficient to permit participation by the common stockholders might well be made. Their specific proposal was for a conditional increase of $155,000,000 in capitalization, the conditional increase to become final at the end of three years if, during those three years, earnings available for interest should average not less than the $34,500,000 annually which they had averaged for 1946, 1947, and 1948. The conditional increase in capitalization would be evidenced by warrants or options, entitling present preferred and common stockholders to receive new Class B common stock if the condition were met at the end of the three-year period. (D.R. 28633-28636.)

Commissioner Cross did not participate. (D.R. 28636.) Commissioner Splawn, concurring in part, believed that the plan was erroneous in providing for the consolidation of all debtors into a single new operating company. As to the matter in question, he remarked in the course of his concurrence that "the report approximates future income as reasonably sufficient to support a capital structure of $612,000,000. There is persuasive evidence that these estimates may be rather conservative." (D.R. 28631.)

The District Court took the narrowest possible view of its function, particularly in respect of the crucial question of authorized capitalization. It noted that the Commission had before it evidence as to earnings from 1925 through 1948, limited testimony as to the development of the Southwestern area, and the improved condition of the properties and resulting operating economies, and that the Commission, in reaching its conclusion, expressed the belief that business activity from 1946 through 1948 could not reasonably be assumed to continue. (R. 919.) It held that the Commission's judgment as to the weight to be accorded the vast changes since the original bankruptcy was "final." (R. 922.) The District Court concluded, without any discussion of the propriety of patterning a 1948 reorganization on pre-1940 forecasts, that "it does not appear the Commission departed from statutory standards." (R. 919.)

The Court of Appeals similarly refused to review the crucial determinations of the Commission. It held that "the action of the Commission in determining the reorganization value was taken in the field where its conclusions are binding. Whether or not there was an equity in the common stock was for the Commission and the trial court did not err in approving its action." (C.R. 37.)

Since the Commission's fashioning of a reorganization plan involves a forecast of economic conditions, and since the proceeding reaches this Court after an interval of time which provides a basis for appraising the correctness of the forecast, it would be inappropriate to fail to acquaint this Court with the current condition of the Missouri Pacific System. Attached as Appendix B hereto is the testimony of Missouri Pacific's Board Chairman, given before the Interstate Commerce Commission on December 3, 1951, on the petition by the Group of Institutional Investors to require the Commission to report changes and developments. Among other things, it shows that the earnings accruing to the common stock of the Missouri Pacific Railroad Company were more than $26 per share in 1950.

The extent and amount of the arbitrary "taking" of property of Missouri Pacific common stockholders is established by this testimony. These become glaring when the assets and earnings of the Missouri Pacific and its 54 subsidiaries are consolidated, and are partially concealed by consolidating the assets and earnings of only the Missouri Pacific and its debtor subsidiaries as the Commission has consistently done. A consolidated balance sheet for the Missouri Pacific Railroad Company, and *all* its subsidiaries, introduced in the Commission hearing and covered in the attached testimony, shows total assets of $1,197,128,620 and an equity of Missouri Pacific stockholders of $152,269,600. The income accounts for 1950 show income available for fixed charges of $57,116,723 and an equity of Missouri Pacific stockholders in such income of $25,419,488.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In failing to suspend the proceedings before it at a time when Section 3 of the Act of April 9, 1948 directed that further proceedings for confirmation of the reorganization plan be suspended;

(2) In proceeding to enter its judgment and issue its opinion of August 14, 1951;

(3) In failing to grant Petitioner's motion for vacation of its judgment and withdrawal of its supporting opinion of August 14, 1951;

(4) In affirming the judgment of the District Court approving the Plan of Reorganization for the Missouri Pacific System certified by the Commission;

(5) In holding that the maximum allowable capitalization for the Missouri Pacific System fixed by the Commission was "binding";

(6) In affirming the holding of the District Court that the Commission had not erred in fixing the maximum allowable capitalization;

(7) In holding that the Commission's estimates of earning power were "supported by credible evidence";

(8) In holding that the Commission's reports show that the Commission, in determining capitalization, gave consideration to past, present and prospective earnings of the System;

(9) In holding that the Commission gave full consideration to the earning power of the New Orleans;

(10) In holding that the Commission's reports show that the Commission had before it evidence of reproduction cost new and of reproduction cost less depreciation;

(11) In holding that the question whether there was an equity in Missouri Pacific common stock was for the Commission, and that the District Court did not err in approving its action;

(12) In holding that there was no sound basis for a finding that the common stock has value or that the equity of the preferred stock is greater than found by the Commission and approved by the District Court;

(13) In affirming a District Court judgment approving a Commission plan of reorganization for Missouri Pacific which would wipe out its common stockholders.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, by failing to act upon your Petitioner's motion for vacation of its order and withdrawal of its supporting opinion, has in effect denied the motion. The motion requires a construction of the important Section 5 of the Act of April 9, 1948, which has never received judicial interpretation or otherwise been before any court. A novel question is thus presented, involving an interpretation of a recent Congressional enactment important in all instances of railroad reorganization.*

The failure of the Court of Appeals to act upon the motion leaves uncertain the views it may entertain as to

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* The motion to vacate the judgment was filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure which provides that such a motion does not affect the finality of the judgment. The case is unlike *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, holding that the time for appeal does not begin to run until disposition of a motion under Rule 52(b). Petitioner's motion would not have been timely under Rule 52(b). See *Jusino* v. *Morales & Tio*, 139 F. 2d 946 (C.A. 1, 1944). *Cf. United States* v. *Schlotfeldt*, 136 F. 2d 935 (C.A. 7, 1943).

the effect of the Act. The Group of Institutional Investors, in opposing the motion, suggested only one reason why Section 3 was inapplicable under the circumstances and thus did not preclude the actions of the Court of Appeals in rendering its opinion and entering a judgment on August 14, 1951. The Group contended that the filing of a petition for Commission review of a reorganization plan, within the terms of the Act, had the effect of suspending only the final proceeding for technical "confirmation" of a plan but no other proceedings prerequisite to, or which are necessary steps along the path to, the ultimate technical act of entering a judgment of confirmation.

We submit that this contention of the Group is seriously erroneous and fraught with mischief for all future railroad reorganization proceedings. On the present state of the record, and unless this Court acts, this view may become widely accepted. The proper interpretation and effect of an important Congressional enactment may thus become initially fixed without there being any assurance that the matter received appropriate judicial consideration.

The construction, which the Group urged and which the Court of Appeals by its inaction appears to have stamped with approval, totally overlooks the scheme of Section 77 of the Bankruptcy Act. Section 77 undertook to utilize both the administrative expertness and specialized knowledge of the Interstate Commerce Commission, and the judicial capabilities of the United States courts, in achieving plans of reorganization for debtor railroad companies which would be equitable and fair to all parties concerned. The Congress acted with care in delimiting the respective functions of Commission and court in Section 77. See *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 468-472, 63 Sup. Ct. 692, 705-707. The scheme contemplates entrusting the Commission with the primary

responsibility for the formation of an appropriate plan of reoganization; the function of the court is the more limited one of satisfying itself that the plan is fair and equitable and was arrived at pursuant to legal standards of fairness. As the Commission's function is "formulation," so the court's function is "confirmation."

While Section 77 provides detailed directions as to procedural steps to be taken at various stages of the passage of a reorganization plan through both Commission and court, it is plain that all judicial proceedings have as a single goal judicial "confirmation" of the Commission plan. All judicial proceedings involving a plan are necessarily "proceedings for the confirmation of the plan." The very function and purpose of all the proceedings are to determine the ultimate question of confirmation *vel non*, and they do not lose their character as "proceedings for confirmation" merely because they are inevitable steps along the path.

What we have suggested would seem to be the necessary meaning of Section 3(a)(5), if its language alone is considered. When consideration is also given to the intention of Congress in enacting the section, this interpretation becomes compelling and unavoidable. The legislative history discloses a Congressional belief that courts were too often being called upon to consider plans of reorganization which the passage of time and the changing of conditions had rendered stale and outmoded.* Con-

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* The Senate Committee on Interstate and Foreign Commerce explained the need for this section of the Act (Sen. Rep. 897, 80th Cong. 2nd Sess.):

> "In the opinion of the committee, the need for this type of re-examination and reconsideration is of the greatest importance where bankruptcy proceedings are pending for many years, as they generally are in most railroad cases. Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes consid-

gress, therefore, permitted parties to reorganization plans pending in the courts to require their reconsideration by the Commission. The key that unlocks the act is the simple passage of time, not the particular stage the judicial proceedings have reached, provided, of course, the judicial proceedings have not been finalized. It mattered not to Congress, as shown by the first three paragraphs of Section 3(a) what stage in the courts the proceedings had reached. Any party to a plan could require the referral of the plan to the Commission, provided only that eighteen months had passed since the Commission's certification of the plan to the court.

The interpretation which the Court of Appeals seems to have adopted by default, would impute to Congress the intention to tolerate the highly unseemly situation in which a reorganization plan would be moving forward coincidentally before the Commission and the courts. This would be true, as the Court of Appeals may have reasoned, because, while the Commission is determining whether its plan requires reconsideration, the court may be only determining whether it is fair and equitable—a matter merely of "approval" and not a "proceeding for

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erably in the long periods which elapse from the time the Commission approves a plan until it is finally confirmed. There is no requirement here that the plan be changed or altered; that lies within the discretion of the Commission. But Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed. Witnesses representing some railroads and some security holders have testified that this has resulted, in many cases, in the consummation of some reorganizations which have failed to render equity to certain classes of security holders who had no remedy or recourse at law. The committee believes that the law should be clarified and the duty of the Commission made plain. This paragraph, and the succeeding paragraphs of this section, are intended to remedy this lack of liaison between courts and the Commission."

confirmation."* But, Section 3(a), particularly in the light of its legislative history, convincingly discloses that Congress wished the parties to have a right to require the Commission to look at possibly stale plans, free and uninhibited by the continuance of court proceedings. Every action taken by a court, and particularly actions which the Group would technically narrow to proceedings for "approval," might be of substantial influence on the Commission.

Obviously, there is no satisfactory solution except the one prescribed by Congress, halting further proceedings of all kinds in regard to a possibly stale plan until the question whether it should be reconsidered is determined by the Commission. The courts ought not to be in the false position of continuing proceedings respecting a plan while the necessity for its reconsideration is being determined. It is unseemly for a court to determine the overall propriety of a reorganization plan at a time when it has just referred to the Commission a petition requiring the Commission to determine its need to reconsider and possibly revise the plan. Inevitably, court and Commission determinations will be seriously overlapping. It is unreasonable to impute to Congress the intention to countenance and require such anomalous situations.

The legislative history is confirmatory of our view. Senate Report 897 on the bill provides that filing the petition "suspends further action by the court involving

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* Precisely this is occurring now. Pursuant to its order of September 28, 1951, the Commission held a hearing (extending from November 27 to December 3, 1951, involving about 1200 pages of testimony and 175 exhibits) on the Group's petition requiring it to report changes and developments to the court. Proposed findings are to be submitted by the parties by January 28, 1952. Should this Court reach the merits of the reorganization plan, the danger of conflict between court and Commission is apparent.

confirmation of the old reorganization plan." Here, again, it is plain that the language "action by the court involving confirmation" is an inclusive phrase descriptive of the judicial function, which is, in its briefest statement, "confirmation." A few pages earlier, Senate Report 897 employed the language: "Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes considerably in the long periods which elapse from the time the Commission approves a plan until it is *finally confirmed*." The language we have italicized demonstrates that Congress had in mind that the total judicial function looks toward "confirmation," and that "proceedings for the confirmation of the plan" means all judicial proceedings upon the plan.

If Congress had in mind that Section 3(a)(5) would suspend some, but not all, judicial proceedings on the plan, it would be normal to anticipate that this unusual technique would be most carefully clarified, preferably in the statute itself, but at least in the underlying legislative history. But there is no indication in the legislative history to demonstrate Congressional intention to resort to this unusual technique. Both Senate Report 897 and Conference Report No. 1603, Statement of the Managers on the Part of the House, employ identical language in explaining that what is now Section 3(a)(5) is:

> "a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission."

This language is entirely inconsistent with any interpretation other than that we urge. If court proceedings

upon the plan continue in some instances, even while the necessity for its reconsideration is being determined by the Commission, then there is no inclusive need to advise the court of the petition. The court would need to be advised only in the event its proceedings were of the particular type requiring suspension. Furthermore, the final sentence of the quoted language cannot be squared with the view that less than all judicial proceedings on a plan are suspended. The Senate and House legislators would not have reported so flatly that, "*of course*," the court retains custody of the property and the case pending the Commission report, if the fact were that the court not only retains custody of the case but is expected to continue its consideration up to a point approaching finality.

There is no reason to believe that Congress desired the courts to continue with those proceedings which, narrowly and technically under Section 205(e), may call for judicial "approval" of the plan. In the first instance, this interpretation assumes that Congress requires the courts to waste their time and energies in continuing with proceedings which may shortly be voided. It further assumes that Congress directed the courts to continue proceedings which an administrative tribunal may at any moment render moot. But the courts are no more accustomed to performing vain acts than they are to resolving controversies which are hypothetical or may become so. *Cf. Muskrat* v. *United States*, 219 U.S. 346.

In the second place, for the courts to proceed with consideration of a plan while the Commission determines whether that plan needs reconsideration, is to invite collision between court and Commission. If this were done, a court might issue an opinion depicting a plan as fair and equitable in the light of all factors, including current conditions, on the precise day the Commission issues a report concluding the plan requires reconsider-

ation in order to be fair and equitable. The converse is equally possible. It is not reasonable to suppose that Congress contemplated for a moment such an anomaly in the administration of justice.

We submit that, in the light of the considerations above adduced, the Court of Appeals erred in entering its order and rendering its opinion of August 14, 1951. In any event, an important and novel question of statutory construction is presented on which the definitive views of this Court are important.

II.

A. The case, on the merits of the reorganization plan, is one of unusually wide public importance. The Missouri Pacific System is one of the nation's great railroad properties, involving upwards of a billion dollars. It provides service to an area of our nation whose recent growth and early future potentialities are hardly less than phenomenal. It is of major importance to the Missouri Pacific System, to its employees, to its patrons and shippers, and to the important area which it serves that the reorganization of this System be soundly and appropriately planned. This Court should not preclude itself from reviewing the propriety of such an important administrative and judicial determination as the adoption of a plan of reorganization for the Missouri Pacific System.

All cases of railroad reorganization are of wide public importance, irrespective of the value of the properties involved. The infrequent opinions of this Court are eagerly awaited to furnish guiding principles to be applied in the complex and delicate adjustment of interests necessarily involved in all reorganizations. Questions of the public interest are dominant in all cases of railroad reorganization. Investors are entitled to full advice as to the basis upon which the Commission may wipe out their investments.

B. It would be anomalous for this Court to refuse to review the plan of reorganization for the Missouri Pacific System which the Commission has devised. Applicants before the Commission, disappointed by its determinations, usually can require this Court as a matter of right to review them. In any of the wide variety of circumstances under which a litigant can challenge a Commission order before a specially constituted three-judge district court (see Sections 2321-2325, Title 28 U. S. Code), direct appeal as of right to this Court is available (Section 1253, Title 28 U. S. Code). Commission determinations, trifling in their consequences and devoid of public interest or legal significance, can thus be brought before this Court.

Under these circumstances, it would be anomalous, indeed, if this Court should refuse to review the Commission's plan of reorganization for the Missouri Pacific System. The Commission has few, if any, functions more important than that of formulating plans of reorganization for major railroad properties. Review by this Court is unusually desirable, both in the light of the importance of the case presented and the importance of the guiding principles established.

Moreover, it is of significance that this Court has already reviewed one aspect of these reorganization proceedings, collateral to the main issues involved. *Comstock* v. *Group of Institutional Investors,* 335 U.S. 211, 68 Sup. Ct. 1454, rehearing denied, 335 U.S. 837, 69 Sup. Ct. 12. Comstock, the holder of Missouri Pacific Railroad Company 5¼% secured serial gold bonds, whose objections in the District Court and the Court of Appeals to the allowance of a claim of approximately $10,000,000 against the New Orleans by its parent Missouri Pacific were denied, successfully sought review by this Court even though he had never laid his objection before the Commission.

C. We submit that the decision below is erroneous. The Court of Appeals seriously misconceived the scope

of review, and both declined to exercise any reviewing function and sanctioned the District Court's similar declination. By the terms of paragraph (e) of Section 77 of the Bankruptcy Act (11 U.S.C. § 205(e)), the district court shall approve any reorganization plan certified to it by the Commission only "if *satisfied* that * * * it complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders * * *."

In the *Comstock* case, *supra* at 227, 68 Sup. Ct. at 1462, this Court spoke of the "broad responsibility laid upon the court for the equity and fairness of the plan as a whole," and added that "the court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it." In *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 63 Sup. Ct. 692, this Court stated in broad terms the relationship between the administrative and judicial functions contemplated by Congress in rail reorganizations. It said:

> "Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, Section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission subject to a degree of participation by the court."

The Court of Appeals, as did the District Court before it, disregarded these admonitions. On the critical question of maximum allowable capitalization, it plainly re-

fused to accord any review other than in form and sustained a similar refusal by the District Court. It held that the Commission's action in fixing a maximum allowable capitalization of $612,000,000 "was taken in the field where its conclusions are binding." (C.R. 37.) It accepted no responsibility for the equity and fairness of the plan in its most crucial aspect, much less the "broad responsibility" which this Court recognized. It misread this Court's references to the Commission's "leadership" and "primary responsibility," in respect of the development of suitable plans, as equivalent to according absolute and binding finality to Commission determinations.

It is important to observe that in rail reorganization cases the judicial function vis-a-vis the administrative function is different in kind from that obtaining in the normal case of judicial review of administratve functions. Section 77 of the Bankruptcy Act contemplates a substantially unique situation wherein Congress has devised a scheme for drawing upon the distinctive capabilities of the judiciary and of the expert administrative tribunal. An unusual court-Commission relationship of intertwined responsibility is created. The Court has a "degree of participation" in, and a "broad responsibility" for, reorganization plans: by the terms of the statute, it must be "satisfied" that the plan is fair and equitable. Both the Court of Appeals and the District Court were misled into the belief that they were called upon only to examine the Commission's plan of reorganization to ascertain, as in normal administrative law cases, whether the plan had some "substantial" evidence in its support, more than a scintilla. Even on this mistaken assumption, the Court of Appeals so limited its examination of the issues before it as to accord an inadequate review. *Cf. Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 71 Sup. Ct. 456.

The Commission's plan cannot withstand the most cursory examination. It rests on economic premises and predictions many of which are grossly erroneous or have been proven incorrect. The Commission adamantly refused to credit the evidence of the decade in which the plan was drawn and persisted in reverting to the 'thirties for its basic economic data and philosophy. Its last plan, devised in 1949, assumes that the economic outlook generally, and particularly for the Missouri Pacific System, was substantially less favorable than was the outlook in 1940 when it devised its first plan on the basis of evidence taken in early 1936 and necessarily reflecting the results of still earlier years.

While the Commission's Fourth and Fifth Supplemental Reports include several conclusory statements to the effect that it based its maximum allowable capitalization on the "entire record," the reports themselves plainly disclose the contrary. Its maximum allowable capitalization is cornerstoned on a forecast of "normal-year" earnings made in 1936, with only slight modification on mere tidbits of the available evidence to reflect the enormous economic changes and developments that have since occurred. The invalidity of the forecast is amply manifest by comparing the prediction of gross operating revenues on which it was framed and the present realities. The forecast assumed average annual gross revenues of $129,000,000; in 1948, the last year available to the Commission, they were over $300,000,000.*

The Commission did not reexamine the validity of the forecast first made in 1936. It assumed its validity in 1949, and then adjusted it, but only partially, to reflect two localized developments between 1936 and 1949. The trustee's Chief Executive Officer testified in the 1948

* According to the Department of Commerce, gross national product rose from 82 billion in 1936 to 282 billion dollars in 1950. Dept. of Commerce, National Income Supplement, Survey of Current Business, July 1951, p. 150.

hearing that the development of the citrus and chemical industries alone would add net earnings of $4,563,679 to the System. The addition of this amount would increase the "normal-year" forecast to $26,622,731. The Commission did not even increase its forecast by the amount of earnings to be realized from only these two sources, but instead lowered the forecast to $25,450,000.

From the face of the Commission's Fourth Supplemental Report, it is plain it gave no heed to a mass of other evidence before it. Nor does it appear even to have apprehended the implications of the evidence to which it purported to give weight. It increased the 1936 forecast by an amount which *partially* reflected the increased earnings to be realized from traffic *originated* by the chemical and the citrus developments. It gave no recognition to the fact that these developments would inevitably have a considerable effect on building up generally the area of their location and would result in greatly increased *inbound* traffic. It likewise gave no attention to "very substantial increases" in traffic other than chemical and citrus, about which the trustee's Chief Executive Officer testified only on *cross-examination* (D.R. 28538-28539).

The Commission, although it made brief reference in its Fourth Supplemental Report to some startling developments (D.R. 28538-28540), obviously concluded they were entitled to no weight. Among these developments, all based upon or in the words of the trustee's Chief Executive Officer, are: (1) Between January 1, 1940 and January 1, 1948, there was an "enormous expansion of peacetime industry which is creating tonnage for transportation by Missouri Pacific Lines. There were 300 industries which expanded their plants with an estimated new capital investment of $449,653,875 and there were 2,248 entirely new industries having an estimated capital investment of $609,737,925, or a total new investment of about $1,059,391,800. As of December 31, 1947, when this data were prepared, the new industries had given

us in the preceding 12 months 292,302 cars of freight, which is equivalent to about 13 percent of all the carload freight handled by the railroad in the year 1947" (R. 38-39); (2) the Rio Grande Valley fruit and vegetable development, large though it was in 1947, is capable of great expansion. A treaty with Mexico contemplated the construction of three new dams, one of which alone would make possible doubling the Valley's then irrigated area (R. 36); (3) oil production and refining along the Texas Coast took "an enormous spurt" about 1939 which was later extended, and during the war there was "tremendous construction" in the refining industry (R. 37); and (4) between 1940 and 1947, when the population of the United States grew 6%, the population of counties served by the Missouri Pacific System grew 9%. Much of this growth took place along the Gulf Coast where it would be of particular benefit to the System. Also, "it is obvious that whenever one section of the country is growing more rapidly than another, there will be a corresponding increase in all of the development and activities that go to make up a complex civilization" (R. 42-43).*

The error of the Commission's forecast of earnings is not merely a matter of speculative opinion. It has proven seriously erroneous. The forecast ($22,059,052 when first adopted in 1940 and $25,450,000 following adjustment in 1949) has been greatly exceeded in every one of the eleven years since it was made. The System earnings are:**

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* For the period from 1940 to 1946, the growth for the area served by the Missouri Pacific System, compared with the growth of the United States as a whole, was at a rate which was 9% greater as to total income payments and 10% greater as to manufacturing wages and salaries (R. 143-145).

** Figures for the last four years are those supplied by the trustee's Chief Accounting and Financial Officer to the Commission at its further hearing in November-December, 1951. Exhibits 1039-1040.

1941	$30,607.244	1946	$30,369,166
1942	$66,205,617	1947	$32,946,964
1943	$44,717.858	1948	$40,707,556
1944	$47,835,479	1949	$28,925,182
1945	$34,251,324	1950	$45,595,589
	1951 (est.)	$35,645,000 (plus)	

There is ample reason to believe the figures for the last four years may be abnormally low. The year 1949, when the System's earnings were at their eleven year low, is the year of the 46 day strike which completely paralyzed the railroad and is not representative (D.R. 28686). In 1949-1950, severe weather conditions seriously curtailed the citrus crop.* In 1951, disastrous floods cost the System millions of dollars.** Moreover, these earnings fail to reflect actual dollar savings of at least $280,948, and other advantages and economies that cannot be measured in dollars, which the Commission found would result from the consolidation of all the debtor railroads into the single company it proposed (D.R. 28656).

It is manifest error for the Commission to predicate maximum allowable capitalization on an earnings forecast so grievously incorrect. Its conclusions on earnings were made in the face of the record, and lack that "material evidence" which this Court has said is essential for the support of its conclusions in both the *Western Pacific* and *St. Paul* cases. When the Commission acted in 1949 to forecast earnings on the basis of 1936

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* See pages 6527-6529 of the transcript of the hearing referred to in the foregoing footnote.

** Expenses for rehabilitation of flood damage were about $2,500,000 (Comm. Tr. pp. 6394, 6442). Traffic yielding about $3,000,000 in gross revenue was lost to the System because of the flood (Comm. Tr. p. 6625), resulting in a loss of net income between $1,000,000 and $1,500,000 (Comm. Tr. p. 6896). It is also to be noted that recently granted mail pay adjustments retroactive to January 1, 1951, and land grant "cutbacks" will increase the estimated 1951 earnings approximately $2,000,000 (Comm. Tr., pp. 6426-6430).

testimony, it committed error of a type which the judiciary is required to correct.

The Commission's conclusions on reproduction cost are equally erroneous and founded on stale evidence, not measuring up to the dignity of "material evidence." It is error of a quality and seriousness requiring judicial correction to determine 1945 and 1946 reproduction costs, not on the basis of prices then current, but on the basis of fictitious and assumed prices which are actually prewar prices.

The magnitude of the Commission's error in this respect is readily determinable. The Engineering Section of the Commission's Bureau of Valuation maintains price indices representing the cost of constructing railroad properties. The indices are issued for each railroad property account, and in weighted average form for each of eight regions into which the country is divided and for all regions combined. The figure for any year represents an average level of railroad construction costs for that year (R. 156-157). The indices are relative to 100 for the base period from 1910 to 1914 (R. 158).

The Commission's Bureau of Valuation computed the System's reproduction cost as of December 31, 1945, by taking the physical property as of that date, valuing it at base prices, and then applying a combined weighted average price multiplier for road and equipment of 152. The price multiplier for the southwestern region was 153 for 1940 and averaged about 151 from 1937 to 1940. For the United States as a whole, the price multiplier was 153 in 1940. (R. 159.) For the years 1945, 1946, 1947 and 1948, the weighted average price multipliers for the southwestern region were 207, 227, 252 and 278. (See 61st Annual Report of the Commission, p. 123; 62nd Annual Report of the Commission, p. 129; 63rd Annual Report of the Commission, p. 128.)

When the Commission increased the fictitious 1945 reproduction costs by 15% to obtain supposed 1946 reproduction costs, it was in effect increasing the price multiplier of 152 by 15%, or using a price multiplier of about 175 (R. 159). Had it used the actual price multiplier of 227 for the year 1946, its figure for reproduction cost less depreciation (but including value of land and rights, net additions and working capital) would approximate $800,000,000 instead of the $639,463,286 figure actually determined. Had the Commission used the 1948 price multiplier of 278, its ultimate figure would have been about $912,000,000.

The Commission's determination of maximum allowable capitalization for the reorganized Missouri Pacific System thus involved an identical error, whether it was engaged in forecasting earnings or computing reproduction costs. In both instances, it wiped out the experience of the 'forties and persisted in reverting to the 'thirties for basic data on revenues, earnings, prices, and the like.* Its major premise, sometimes articulated and always present, was that the 'thirties represented "normalcy" and that the 'forties were years of abnormality not entitled to consideration. This philosophy is particularly unappealing from the viewpoint of 1952 when the national defense policy, involving unavoidably huge federal expenditures and a consequent high level of economic activity, is well established. How seriously erroneous was the Commission's prophecy is exemplified by its expressed belief that "business activity from 1946 through 1948 * * * has been at an unusually high level" (D.R. 28546). Its oblivion to the times is apparent from its pallid statement that "the record indicates that the average annual volume of traffic and gross operating revenues of the debtors in the future will be larger than

* It was clear to the dissenters that the majority fashioned its Plan on pre-1940 data. Their dissent was predicated on the belief that "future performance will be substantially better than *the peacetime record of the past*" (D.R. 28634).

the average for the five years or ten years immediately preceding the war." (D.R. 28542.)

The refusal of the courts below to accord any judicial review of the Commission's determinations grew out of an erroneous and unprecedented belief in the sacrosanctity of those determinations, and can now only be corrected by this Court's according review.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON K. WHEELER
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Of Counsel:
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704 Southern Building
Washington 5, D. C.
January 1952

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI PACIFIC RAILROAD COMPANY,
and others,

Appellants,

v.

GROUP OF INSTITUTIONAL INVESTORS, ETC.,
et al,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Nos. 14, 264-14, 274

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO VACATE THE JUDGMENT.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Comes now Missouri Pacific Railroad Company, a principal debtor in the above-entitled cause, and moves this Honorable Court to vacate and set aside the judgment heretofore made and entered in said cause on the fourteenth day of August, 1951, and to withdraw its supporting opinion rendered on the same date, for the following reasons and upon the following grounds:

1. Because the judgment is void as having been entered in violation of the Act of April 9, 1948 (11 U.S.C. § 208) and at a time when, under such Act, all proceedings were to have been suspended. Pursuant to the pro-

visions of such Act, the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company filed a petition dated July 11, 1951 (or before the entry of the judgment herein prayed to be vacated), requesting that the Interstate Commerce Commission report any changes, facts or developments which had occurred since the Commission's approval of the Plan of Reorganization which had not been provided for in the Plan and which in the opinion of the Commission made it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise the Plan in order to insure that, if put into effect, it should then in the opinion of the Commission be fair and equitable and in the public interest and compatible with the provisions of 11 U.S.C. § 208 and Section 77 of the Bankruptcy Act, as amended. The United States District Court, Eastern Division, Eastern Judicial District of Missouri, thereupon entered its order dated July 13, 1951, referring the petition to the Interstate Commerce Commission. The Act of April 9, 1948, expressly provides that upon the filing of such a petition "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission * * *." (11 U.S.C. § 208(a)(5))

A memorandum of points and authorities in support of this motion is attached.

MISSOURI PACIFIC RAILROAD COMPANY

By /s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER
Its Attorney

Of Counsel:
WHEELER & WHEELER
704 Southern Building
Washington 5, D. C.

Dated: October 17, 1951

AFFIDAVIT OF SERVICE

I hereby certify that copies of the foregoing motion, and of the attached memorandum of points and authorities in support thereof, were served upon counsel for all parties of record.

/s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER

Washington, D. C.
October 17, 1951

APPENDIX B

TESTIMONY OF T. C. DAVIS, CHAIRMAN OF THE BOARD, MISSOURI PACIFIC RAILROAD COMPANY BEFORE THE INTERSTATE COMMERCE COMMISSION ON DECEMBER 3, 1951

The plan of reorganization certified to the court in December, 1949, carried an effective date of January 1, 1948, and was largely predicated on the balance sheet figures of December 31, 1947. The principal of stocks and bonds outstanding at that time and the interest accumulations to that date were provided for in the plan or otherwise disposed of.

The consolidated balance sheet for MOP, NOT&M and IGN as of December 31, 1947, after writing off the MOP investment in NOT&M and IGN plus the investment of NOT&M in IGN and assuming the issuance of new securities provided by the plan plus the use of cash, shows an uncapitalized surplus of $127,082,036.

In other words, the balance sheet of the new company as of January 1, 1948 would show a surplus of $127,082,036. In this setup, the NOT&M, even though admitted by the ICC in its report to be worth $83,700,000,

as a separate company, is capitalized at approximately $44,000,000 in the pending plan.

Furthermore, assets of the MOP are carried at book value, in many cases based on acquisition cost of more than 20 years ago. In cases where acquisitions have proven unprofitable or unsound, such properties have in several instances been written off. On the other hand, those properties that have proven profitable have not been written up to their true value. For instance, the American Refrigerator Transit with a surplus in excess of $20,000,000 is still carried on the MOP books at $378,300. MOP owns 71 per cent of that company and its surplus, represented by cash, properties and earning power.

Another example is the ownership of Texas and Pacific, carried on the books of MOP at $25,557,744, of which $23,000,000 is in preferred stock. This preferred is absolutely worth par and could readily be retired by the T&P through the use of its surplus cash and/or the sale to the public of T&P debentures, and this would serve to lessen the tax requirement of T&P.

The trustee could readily exercise his control of T&P to accomplish this.

Cash received would accrue to the first and refunding bonds and should be paid to these bondholders in liquidation of their claim. The retirement of the T&P preferred would in no way affect the control of that property by MOP, as the latter would continue to own a 59 per cent interest in T&P by virtue of the common stockholding.

T&P surplus as of December 31, 1950 was $80,416,073 and this is 59 per cent owned by MOP. It seems probable that this surplus item will approximate $85,000,000 by the end of 1951. I am sure I am too conservative.

In these two subsidiaries alone there is now more than $100,000,000 of surplus largely belonging to MOP and for which only the value of $2,233,044 is considered in this proposed reorganization plan.

A consolidation of the balance sheets of Missouri Pacific, NOT&M and IGN as of December 31, 1947 shows a deficit surplus account of $35,658,572. This is not a true deficit as the actual values of MOP investments in subsidiaries other than NOT&M and IGN are not considered at their real value.

However, this is the basis for the pending reorganization plan. Applying this balance sheet to the new company which means the cancellation of old securities and the issuance of new as provided in the plan, there would remain a surplus, uncapitalized of approximately $127,082,036, as of that date. If it is the intention of the ICC to write off these values and restate them at the hypothetical value set up by the ICC in its report, the company and its security holders would suffer a very severe tax loss. On any sound approach to the reorganization of the system and the issuance of new securities, the old capitalization must stand.

Now let's see what has happened since this plan was formulated with an effective date of January 1, 1948.

The consolidated balance sheet of Missouri Pacific, NOT&M and IGN for the year ending December 31, 1950, shows earned surplus of $11,449,366 and this includes a deficit surplus of the IGN amounting to $20,869,482. The improvement in the consolidated surplus for the three year period amounts to $47,107,938. In other words, we go from a deficit position of approximately $35,000,000 to a credit surplus of approximately $11,500,000 or a net increase of some $47,000,000.

And I would like to say that I am talking about earned surplus not total surplus, because these figures differ

materially, and a comparison would be even stronger in my standpoint.

Applying the issuance of new securities to the 1950 balance sheet and including all accruals on securities to be issued, we find a surplus of $176,903,261 uncapitalized. Now I am talking about the 1950 balance sheet. In other words, this surplus is readily usable for the satisfaction of the claims of the preferred and common stockholders and should be so used. The bond claims have already been satisfied.

During the period from January 1, 1948 to January 1, 1951, the trustee has spent for road—taking road at net—and equipment the sum of $110,832,619, and for equipment alone $82,431,769.

Mr. Boyden, I would like to say here, these figures are all taken from the published figures, and not taken from the exhibits put in here. There may be some difference in those, because I don't know what subsidiaries were included in the figures in the exhibits. These are taken from the Price Waterhouse audits, and are conclusive.

A substantial portion of the money spent for equipment has not been financed and the actual cash cost for the purchase of equipment amounted to $38,581,221. The amount financed equalled $43,850,548. There has been spent for retirement of equipment obligations during this period, $15,263,072. Actually, the trustee has, during this period made a cash outlay for equipment, the sum of $53,844,293. Notwithstanding this severe drain on the cash resources of the railroad, cash has again reached the staggering proportion of more than $105,000,000.

The Commission, the trustee, and in fact everyone connected in any way with this reorganization knows full well that the NOT&M is entirely solvent. In fact, as before stated, the ICC has indicated that the reorganization of the NOT&M alone is capitalizable at $83,700,-

000. This road has outstanding approximately $40,000,000 of bonds and owes a claim to the Missouri Pacific of approximately $10,000,000. The interest accrual on this claim of about another $10,000,000.

Alleghany, recognizing the soundness of the NOT&M, offered to finance the claim to the extent of $20,000,000, but the trustee declined to discuss the matter on the ground that a plan of reorganization was before the court.

* * * *

The surplus deficit shown for NOT&M in the December 31, 1947 balance sheet is misleading and is entirely refuted by the Price-Waterhouse audits. An exhibit filed in these proceedings shows that surplus as of September 30, 1951 stands at $15,773,183.

The only possible problem in this reorganization is the IGN but there again we find MOP advances to it drawing interest and affecting this road's surplus while at the same time the trustee has written off on the books of the Missouri Pacific the entire value of this claim amounting to $2,748,218. On the books of the IGN this same claim is carried as a debt and there has been accumulated to December 31, 1950 $2,427,924 of interest.

The IGN thus acknowledges its debt to MOP in the sum of $5,222,016. Thus, the interest accrual on the NOT&M books and on the IGN books has not been picked up on the books of the Missouri Pacific. The total of this interest alone is in excess of $13,000,000 and with the principal of the claims now amounts to more than $25,000,000.

In other words, this system reorganization penalizes the Missouri Pacific by more than $25,000,000 of debt owed it by NOT&M and IGN. These debts plus the investment in NOT&M common amount to $42,000,000. Think of it, these assets, belonging to the MOP stock-

holders are blithely written off in this system reorganization.

The first mortgage bonds of the IGN can easily be serviced by the railroad and there is no cause or reason for the first mortgage bondholders of the IGN to suffer the loss which this plan inflicts upon them. These bonds are entirely sound. It is incomprehensible that the committee representing the first mortgage bondholders of the IGN permit, let alone support the present reorganization plan.

However, this committee did suggest that the IGN be reorganized separately. The solution of this problem of reorganization can be found in the separate reorganization of these three corporations. Let me add now that under any reasonable reorganization of these three properties, the Missouri Pacific will not lose control of the NOT&M nor the IGN, but MOP's investment in these companies will properly be reflected in the assets of the parent company and these values will accrue to the stockholders. In my opinion, it is fraudulent to perpetrate upon the stockholders of the Missouri Pacific this obvious appropriation of their assets. The cloak of reorganization cannot disguise this appalling abuse of MOP stockholders.

In other words, there is absolutely no excuse to set up a system reorganization of these properties when it is a well known fact that in doing so the Missouri Pacific stockholders must and will be severally penalized.

There is no reason to ask the IGN first mortgage bondholders to give up their prior claim. They should obtain complete satisfaction for the accruals and the principal of their bonds. This first mortgage bond is more than adequately secured and earnings are more than ample to service this debt.

There is no sound reason why any Missouri Pacific security holder should be required to sacrifice his position or his equity in the securities he owns.

When the pending plan was written, the December 31, 1947 balance sheet of the Missouri Pacific alone indicated a surplus deficit of $17,192,835. As of December 31, 1950, this same balance sheet indicated a credit surplus of $17,670,037, and as of September 30, 1951, had reached the sum of $23,138,172. This is obviously a change of some $40,000,000 in a period of three years.

The 1950 surplus addition exceeded $17,000,000. I would like to point out that these figures do not reflect the assets and earnings of the company's important subsidiaries. From December 31, 1947 to December 31, 1950, the investments in road and equipment increased from $616,276,859 to $679,426,620 or $63,148,761. Of this increase, equipment alone accounted for $44,935,932. The cash was $46,308,498 on December 31, 1947, and stood at $61,289,695 as of December 31, 1950. The actual cash on hand as of October 26, 1951 of the Missouri Pacific Railroad alone was $90,815,183.

In this connection, I would like to point out that the trustee has expended for equipment the sum of $58,587,416 during this period and $29,575,036 spent for equipment was financed. I am talking about the Missouri Pacific property now, and talking about it alone.

The trustee actually spent MOP cash for or on account of equipment during this period the sum of $41,513,918 (including equipment obligations retired of $10,552,546).

The total assets of the Missouri Pacific Railroad Company alone and again without reflecting the true value of its investment and its interest in the cash and surpluses of subsidiaries, stood at $695,320,663 as of De-

cember 31, 1947, and $767,396,948 at the end of 1950. Changed conditions? Just an increase of $72,000,000 in this item alone.

Furthermore, the trustee has acquired since December 31, 1947, $820,000 par value of serial 5¼'s, $1,105,000 of central branch first mortgage bonds, and $1,699,000 par value of bonds of the Cairo & Thebes, or a total of $3,629,000 of par value of bonds. Actually, this represented considerably more in claims against the railroad for there was much accumulated interest.

Missouri Pacific assets, as of December 31, 1950, were carried on its books at $767,263,137. However, the consolidated statement of Missouri Pacific with its subsidiaries shows total assets of $1,354,273,553 before intercompany eliminations and total assets of $1,197,128,620 after such elimination.

• • • •

This figure has been substantially increased during 1951. I cite that because I have seen certain exhibits here that have been placed in the record bringing the proportions of earnings and other things up to September 30 I think there can be no doubt about that.

This consolidated statement shows total assets of $1,364,273,553. I just wanted to compare that with the assets which were included or used in formulating this plan, and those assets were $695,320,662, as heretofore quoted on another page ahead of this.

Here is a company with assets of more than $1,200,000,000—good, sound assets—with huge pools of new equipment—with road properties modernized and in excellent shape—with cash resources in excess of $150,000,000—and this plan offers to recapitalize these properties at $512,429,635.

I want to say here I am talking about MOP alone. This capitalization provides approximately 44 million for

the NOT&M, and 56 million for the IGN, or approximately 100 million dollars.

This statement indicates capital and surplus of $294,-138,541. If we substitute the new securities to be issued under this plan for those now existing, we will increase this capital and surplus account by $158,000,000, thus bringing the consolidated capital and surplus account of the Missouri Pacific Railroad Company, on a consolidated basis, to a figure in excess of $450,000,000.

For the year 1950, these properties earned, after taxes, available for fixed charges (but after eliminations) $57,-116,723. After providing for fixed charges there remained $30,699,077 of earnings. Further deductions of amounts required for special funds brought net earnings down to $29,543,443. Of this latter amount $4,123,955 represented the equity of stockholders of subsidiaries other than the Missouri Pacific.

The remaining total of earnings amounting to $25,-419,488 represents the equity of the stockholders of the Missouri Pacific in these earnings, and just to show how ridiculous this whole situation is—the earnings accruing to the common stock of the Missouri Pacific for the year 1950—on the basis of the old capitalization—amounted to more than $26 per share.

Yet, the Commission insists that Missouri Pacific common is worthless. I recall that the common stock of the St. Louis, Southwestern (Cotton Belt) was also considered by the Commission and the same court to be worthless and yet it is now selling around $240, per share.

The increase in mail pay recently granted the railroads amounts to roughly 32 percent plus certain terminal charges. I am sure the railroads themselves do not know exactly how this increase is going to work out as yet, but there is a very substantial increase here. The

Missouri Pacific System received for 1950 the sum of $10,672,099 for carrying mail. Actually, the System reported $14,717,399 but $4,045,300 covered the period of 1947-49.

For the nine months ending September 30, 1951, the system reports income from mail of $7,411,934. Adding an estimate for the fourth quarter of $2,500,000, which I believe is really too conservative, it appears that mail revenue for 1951 for the system will certainly reach $9,911,934.

The increase granted should therefore exceed $3,171,000 which will serve to increase the earnings by that figure. Mr. Peet agreed in his testimony that $2,900,000 would be about right. I think it is important to think of this thing in the light of the service on debt. This money would service 80 million of bonds at four percent.

Inasmuch as the Missouri Pacific has suffered certain flood losses during 1951, the charge to income for which has amounted to $2,237,000 to September 30, it is apparent that this increase comes at an opportune moment. The gross income for the system for 1951 will therefore exceed $13,000,000 of revenue for handling mail.

In 1947 the system received $6,041,828. Here is another change in conditions affecting the income of the Missouri Pacific—an increase of $7,000,000 of income since 1947. And may I point out that there is nothing temporary about this nor will the gross of $13,000,000 mail pay be affected by weather conditions. What I am thinking of is this citrus discussion here. With the steady increase in population and industrial growth in the area served by the Missouri Pacific, gross receipts from mail should continue its upward trend. The actual increase in the mail pay since December 1947, is approximately eighty percent.

Now, about the future earnings of the Missouri Pacific.

Mr. Peet in his testimony here, agreed that under certain assumptions (those now prevailing), as I understood it, the Missouri Pacific System should earn $43,000,000 in 1952. Of course, this does not include the earnings of subsidiaries wholly or partially owned by MOP and not included in the published statements, to which it is entitled.

Is it not about time that we all take a realistic view of the earnings of this railroad. In financial circles, any banker will finance a company on such a ten year record of earnings. However, there are certain people here who want to go back twenty years—to the "dust bowl" days—in order to forecast the future earnings of these properties.

Does anyone doubt that we have a different economy than that existing twenty years ago? Why not approach this problem from where we are today and where we believe we are going Certainly the past is now so distorted by permanent economic changes that we must look to the future. Why should we modernize and dieselize if we are going to return to the "dust bowl" days. Suppose Nebraska ships less wheat—you don't believe that Nebraska is going to stand still, do you? Nebraska will produce and ship other products to compensate for her wheat decline.

The Missouri Pacific Railroad is fortunate that it serves these eleven states where initiative and determination still thrive. This is much more important than a temporary decline in a wheat crop.

In all of the cases the railroads have presented to the Commission requesting higher rates, the Commission has found that the percentage of increased rates finally granted were adequate to cover the higher cost. The

Commission has presumably satisfied this situation by granting increases sufficient to meet the increase in wages and prices. It is only reasonable to assume the Commission will continue to solve this problem.

There is no reason for bondholders or stockholders to be sacrificed. This plan should be recalled at once and if the debtor were permitted to sit down with this Commission, a realistic reorganization of these properties could be worked out quickly. We are no longer in need of Section 77.

The New Orleans, Texas & Mexico Railway is solvent.

The Missouri Pacific Railroad is solvent.

The International-Great Northern R. R. can be reorganized separately.

What we do need and require is a "straight from the shoulder" solution through the application of the Mahaffie Act.

The real assets of the Missouri Pacific, revealed here today for the first time, clearly show that the Missouri Pacific Stock is no more worthless than was the "Cotton Belt" stock when so declared by the Commission in the reorganization plan for that railroad.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

1951 R. = The printed record filed in said United States Court of Appeals in Causes Nos. 14,264-14,274.

1946 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

1941 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,
Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8th Cir. 1951).

The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

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* A list of abbreviations and references used in this brief is on page ii, *supra*.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Questions Presented.

1. Whether the District Court performed the duties imposed upon it by Section 77 (e) of the Bankruptcy Act, 11 U. S. C. §205(e), when it approved the Plan of Reorganization for the Missouri Pacific Railroad System certified to it by the Interstate Commerce Commission.

Respondent respectfully refers this Court to its brief in No. 525, *Alleghany Corporation* v. *Group of Institutional Investors, etc.,* for its argument on this question.*

2. Whether the filing of a petition with the District Court pursuant to 11 U. S. C. §208(a) (1) which suspends "all further proceedings for confirmation of the plan" also suspends the proceedings for approval of a plan of reorganization.

Statutes Involved.

The pertinent provisions of 11 U. S. C. §208(a) and Section 77 of the Bankruptcy Act are set forth in the Petition at pp. 3-9.

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* Petitioner has attached as Appendix B to its Petition some of the testimony of its witness, T. C. Davis, at hearings held pursuant to 11 U. S. C. §208(a)(1) before the Interstate Commerce Commission, from November 27 to December 3, 1951. Those hearings were to determine whether any "changes, facts, or developments" have occurred since the approval of the Plan which were not provided for in the Plan and which make it necessary for the Commission to re-examine it. A record of over 1,250 pages was made and more than 150 exhibits were received. Much of this material contradicts the facts and conclusions testified to by Mr. Davis.

Respondent respectfully submits that this Court's action should be based on the evidence in the record before it, which does not include any of the testimony or exhibits received at those hearings before the Commission. While respondent does not believe that any changes have occurred since the approval of the Plan which require its reconsideration by the Commission, it submits that the proper forum for the determination of that question is the Interstate Commerce Commission, and the Commission is now in the process of making that determination.

Statement.

On October 30, 1950, the United States District Court for the Eastern District of Missouri entered its Order No. 3571 approving the Plan of Reorganization for the Missouri Pacific System certified to it by the Interstate Commerce Commission (93 F. Supp. 832).

On July 11, 1951 various parties to these reorganization proceedings filed a petition with the District Court, pursuant to 11 U. S. C. §208(a) requesting that the Interstate Commerce Commission be directed to report to the Court

> "any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan * * *."

On July 13, 1951, the District Court referred this petition to the Commission which ordered a public hearing for November 27, 1951. These hearings were held from November 27 to December 3, 1951 before a Trial Examiner who will receive briefs on February 12, 1952, and thereafter prepare his report which will be considered by the Commission.

On August 14, 1951, the Court of Appeals for the Eighth Circuit unanimously affirmed the order of the District Court approving the Plan of Reorganization. Two of the appellants in that Court, the State of Texas and James B. Morris *et al.*, filed petitions in this Court on November 7, 1951, for writs of certiorari to review that decision of the Court of Appeals (*State of Texas* v. *Group of Institutional Investors etc.*, No. 416; *James B. Morris, et al. v. Group of Institutional Investors, et al.*, No. 415). Other appellants had obtained orders from this Court extending their time to

file petitions for writs of certiorari to and including January 11, 1952 (Nos. 524-528).

On January 2, 1952 this Court denied certiorari in No. 416, and on January 28 this Court denied certiorari in No. 415.

Argument.

11 U. S. C. §208,* enacted on April 9, 1948, makes it clear that the Interstate Commerce Commission or the District Court may determine whether relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed since the approval of the Plan by the Commission and before final confirmation of the Plan by the Courts. Its sole purpose was to "correct a situation which has heretofore prevented reconsideration of a reorganization plan years after it first had been promulgated. It does this by placing the duty upon the Commission under prescribed conditions and circumstances, of reporting current facts and conditions surrounding a railroad which might alter or affect provisions of a reorganization plan prepared years before." Sen. Rep. No. 897, 80th Cong., 2d Sess. (1948) 2.**

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* Section 208 is §3 of Public Law No. 478, 80th Cong., 2d Sess. (April 9, 1948), 62 Stat. 162, 167. Sections 1 and 2 of Public Law 478 amend Part I of the Interstate Commerce Act by adding a §20b which establishes a voluntary extrajudicial procedure whereby a railroad carrier may make alterations and modifications in its securities merely by obtaining the approval of the Interstate Commerce Commission and the consent of a specified percentage of the security holders to be affected. See 48 Col. L. Rev. 689, 690 (1938). As originally passed by the House of Representatives, Public Law 478 contained only these two sections. Section 3, now 11 U. S. C. A. §208, was a Senate amendment. See Senate Report No. 897, 80th Cong., 2d Sess. (1948) 7.

** "* * * Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed * * * The Committee believes that the law should be clarified and the duty of the Commission made plain."

Upon the filing of a petition under 11 U. S. C. §208(a)(1) "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court." 11 U. S. C. §208(a)(5). The Senate Report said that this subsection:

> "is also a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission." Sen. Rep. No. 897, p. 8.

I.

Section 208 does not suspend this proceeding for approval of the plan.

There is a clear distinction in Section 77 between proceedings for approval of a plan and proceedings for confirmation of a plan. The first paragraph of subsection (e) provides the standards under which "the judge shall approve the plan," while the third paragraph of subsection (e) provides the standards by which "the judge shall confirm the plan." Only "upon confirmation by the judge" are the provisions of the plan "binding upon the debtor, all stockholders thereof . . . and all creditors." And it is only after confirmation that the new corporation has power to carry out the terms of the plan and to issue securities, assume obligations, transfer property, etc. "to the extent contemplated by the plan." Section 77(f).

Petitioners insist that when Congress said that proceedings for confirmation of plan are suspended it just ignored this distinction between approval and confirmation. Yet in the very same Public Law which included 11 U. S. C. §208 Congress demonstrated that it understood this distinction. Section 2 of Public Law 478, 49 U. S. C. §20(b) established a voluntary extrajudicial procedure whereby a railroad could modify its financial structure (see *supra*, p. 4). Subparagraph (13) of Section 2, 49 U. S. C. §20(b)(13), provides that this extrajudicial procedure is available to a railroad in reorganization provided the reorganization court permits its use. The subparagraph then provides:

> "Upon granting of such permission, such [reorganization] proceeding, so far as it relates to a plan of reorganization, shall be suspended."

There is no warrant for ignoring the difference between the broad scope of that language and the limited scope of Section 3 of Public Law 478, 11 U. S. C. §208 (a)(5), that

> ". . . all further proceedings for confirmation of the plan shall be suspended . . ."

Petitioner's appeal to the legislative history of 11 U. S. C. §208 is subject to the same defects discussed by this Court in *Ex Parte Collett*, 337 U. S. 55, 61 (1949). First the "short answer is that there is no need to refer to the legislative history where the statutory language is clear." Second "the legislative history does not support petitioner's position." The Senate Report makes it clear that 11 U. S. C. §208 had the limited and noncontroversial* purpose of giv-

* See 94 Cong. Rec. 1687 (1948) ("The Committee on Interstate and Foreign Commerce has considered the bill. The Committee has held hearings. We have deleted from the bill every controversial point. No one, to my knowledge, objects to any provision of the bill"). See also 94 Cong. Rec. 1765 (1948).

ing the Commission a chance for a second look at its Plan in the light of developments that had occurred since its approval. The affirmance by the Court of Appeals of the District Court's approval of the Plan has not in the least affected action by the Commission under Section 208(a). The consideration by this Court of the petitions for certiorari to review that affirmance is equally irrelevant to the proceedings by the Commission under that Section.

Conclusion.

There is no reasonable basis in the language or legislative history of 11 U. S. C. §208 for Petitioner's contention that the Court of Appeals or this Court have no power to consider and review the District Court's approval of the Plan while proceedings under Section 208(a) are pending. This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U. S.
FEB 13 1952

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 524, 525, 526, 527 and 528

CHEMICAL BANK & TRUST COMPANY, as Trustee under the Indenture dated as of December 1, 1926 securing Missouri Pacific Secured Serial Bonds; ALLEGHANY CORPORATION; MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE; JOHN V. FARWELL, III, *et al.*, Independent Directors of the Missouri Pacific Railroad Company; and MISSOURI PACIFIC RAILROAD COMPANY,

Petitioners.

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Dated: February 15, 1952.

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Swaine, Robert, "A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act", 56 Harv. L. Rev. 1193 (1943) 19

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Abbreviations Used in This Brief

Alleghany:	Alleghany Corporation. (Cause No. 525)
Commission:	Interstate Commerce Commission.
Debtor:	Missouri Pacific Railroad Company. (Cause No. 528)
District Court:	District Court of the United States, Eastern Judicial District of Missouri, Eastern Division.
First and Refunding Bonds:	First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.
Independent Directors:	John V. Farwell, III, et al., a dissident minority of the directors of the Debtor. (Cause No. 527)
International:	International-Great Northern Railroad Company, a subsidiary of New Orleans and a debtor in these proceedings.
Missouri Pacific:	Missouri Pacific Railroad Company, the principal debtor in these proceedings.
New Orleans:	New Orleans, Texas & Mexico Railway Company and its fourteen subsidiaries (other than the International), all debtors in these proceedings.

* References too numerous to list.

Plan:	The Plan of Reorganization contained in the Fifth Supplemental Order of the Commission dated December 29, 1949 (Vol. LII, pp. 28689-28759).
1940 Plan:	Plan of Reorganization set forth in the Supplemental Order of the Commission, dated April 9, 1940 (1941 R. Vol. II, pp. 483-548).
1944 Plan:	The Plan of Reorganization set forth in the Supplemental Order of the Commission, dated October 9, 1944 (1946 R. Vol. II, pp. 783-852).
R.:	The printed record on appeal filed with the Court below in 1951 in Appeals Nos. 14264-14274, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
1941 R.:	The record on appeal filed with the Court below in 1941 in Appeals Nos. 12130 to 12136, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
1946 R.:	The printed record on appeal filed with the Court below in 1946 in Appeals Nos. 13367 to 13369, inclusive, and 13371 to 13373, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
Section 77:	Section 77 of the Bankruptcy Act (11 U.S.C.A. §205).
Section 208:	Section 3 of Public Law 478, approved April 9, 1948 (62 Stat. 167; 11 U.S.C.A. §208; see Appendix C, p. 38, *infra*).
Serial Bonds:	Missouri Pacific Railroad Company 5¼% Secured Serial Gold Bonds.

Serial Committee:	Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee. (Cause No. 526)
Serial Trustee:	Chemical Bank & Trust Company, Trustee for Missouri Pacific Railroad Company 5¼% Secured Serial Gold Bonds. (Cause No. 524)
System:	The Missouri Pacific, the New Orleans, the International and the other debtors listed in the last paragraph of Section B of the Plan and the corporations listed in Section C of the Plan (Vol. LII, pp. 28692-93).
Tr.:	Transcript of proceedings in the Court below in Appeals Nos. 14256 and 14264-14274, certified to the Clerk of this Court as part of the record on Petitions 524-528.
Vol. LII:	Volume LII (pp. 28461-28760) of the printed record in the District Court, which was certified to the Clerk of this Court as part of the record on Petitions 524-528.

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 524, 525, 526, 527 and 528

CHEMICAL BANK & TRUST COMPANY, as Trustee under the Indenture dated as of December 1, 1926 securing Missouri Pacific Secured Serial Bonds; ALLEGHANY CORPORATION; MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE; JOHN V. FARWELL, III, *et al.*, Independent Directors of the Missouri Pacific Railroad Company; and MISSOURI PACIFIC RAILROAD COMPANY,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This brief is filed in opposition to the petitions in the above entitled causes for writs of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, approving the Plan.

Opinions Below

Court of Appeals—*State of Texas* v. *Group of Institutional Investors, et al.*, 191 F. 2d 265 (8th Cir. 1951); (Tr. 14-36).

District Court—*In re Missouri Pacific R. Co.*, 93 F. Supp. 832 (E.D. Mo. 1950); (R. 915-945).

Commission—*Missouri Pacific Railroad Company Reorganization*, 275 I.C.C. 59, 203 (1949); (Vol. LII, pp. 28461-28760).

Jurisdiction

All of the petitioners invoke the jurisdiction of this Court under Section 1254 of the Judicial Code (28 U.S.C.A. §1254). Some of the petitioners also rely on Section 24c of the Bankruptcy Act (11 U.S.C.A. §47; Serial Trustee's Petition, p. 5, Alleghany Petition, p. 3, Debtor's Petition, p. 2). The motion of the Independent Directors contains no citation to any statute or decision which indicates that the jurisdiction of this Court can be invoked by such a motion.

Preliminary Statement

The petitions contain a brief summary of the history of these proceedings. These summary statements serve to emphasize an outstanding fact. On March 31st of this year these proceedings will have been pending for nineteen years. During this long period the creditors in this reorganization have been enjoined from enforcing their claims. Junior creditors holding claims of approximately $120,000,000 in principal amount have received no interest whatever on their claims since the inception of these proceedings. With a single important exception—the New Orleans First Mortgage bondholders—the senior creditors whose claims are dealt with in the Plan have

received interest during these proceedings at an average rate far below the rates of interest to be borne by the new securities allocated to them under the Plan. This situation has prevailed notwithstanding the high level of earnings during the war years, which the petitioners emphasize. Such a situation certainly was not foreseen by this Court when it rendered the first of its important decisions construing Section 77. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Company,* 294 U. S. 648 (1935). It is inconceivable that Congress should have intended such a result. This long delay ought not to be ignored in considering the arguments which urge this Court to postpone consideration of the petitions or to adopt a construction of Section 208 which would prevent this Court from settling promptly the questions which the petitioners say are of sufficient importance to merit review by this Court. (See Point I, p. 8, *infra*; Independent Directors Pet., pp. 31-32, Debtor's Pet., pp. 2-3, 26-33.)

A. The Petitioners

The petitioners* may be conveniently classified as follows:

(i) Those who object to the treatment of the New Orleans capital stock—the Serial Trustee and the Serial Committee (Causes Nos. 524 and 526);

(ii) Those who object to the treatment of the Missouri Pacific equity—Alleghany and the Debtor, which is controlled by Alleghany through ownership of a large block of common stock (Vol. LII, p. 28480; Causes Nos. 525 and

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* Other petitions for certiorari in this proceeding were filed by the State of Texas (Cause No. 416) and Morris, *et al.* (Cause No. 415) in November 1951. This Court denied these petitions on January 2 and 28, 1952, respectively.

528). The Independent Directors fall into this group also (Cause No. 527).*

The Plan deals with thirteen classes of creditors.† Representatives of only one of these classes, holders of the Serial Bonds, have filed petitions seeking review of the judgment below (Causes Nos. 415, 524 and 526). The Court below correctly stated: "None of the preceding plans of reorganization received such general measure of acceptance by creditors" (Tr. 18; *In re Missouri Pacific R. Co.*, 50 F. Supp. 936, 943 (E.D. Mo. 1943); *Wright* v. *Group of Institutional Investors*, 163 F. 2d 1022 (8th Cir., 1947)). But as the Court below noted, "It is unlikely that all the other creditors are entirely satisfied with [the Plan] as the claims of only one of the classes, the New Orleans First Mortgage Bonds, are to be satisfied in full in cash or its equivalent. All the rest must submit to substantial adjustments" (Tr. 18). Appendix A, page 33, *infra*, indicates how far short the Plan falls of providing satisfaction of the claims of System creditors in a realistic sense.

B. The questions presented by the petitions

The principal contentions of the petitioners are that

(i) all proceedings for approval of the Plan are suspended by the provisions of Section 208(a)(5) because of the pendency of the proceeding before the Commission under Section 208(a)(1)** (Independent Directors Pet., pp. 9-10 and Motion, pp. 25-32; Debtor's Pet., pp. 26-33).

* However, these dissident directors, being a minority, do not speak for the Debtor. Nor do they have any authority under Section 77(p) to represent security holders of any class. As a minority of directors, they have no interest in this reorganization which is entitled to the protection of the courts or the Commission. Section 77(e) required the District Court to hear only "parties in interest".

† Exclusive of holders of Cairo and Thebes Railroad Company 4% First Mortgage Bonds (all of which were acquired by the Trustee on December 1, 1950) and equipment obligations.

** The pertinent provisions of Section 208 are set forth in Appendix C (p. 38, *infra*).

(ii) the findings of the Commission as to earning power, value and capitalization are not supported by the weight of the evidence (Alleghany Pet., pp. 30-38; Serial Trustee Pet., p. 10; Serial Committee Pet., pp. 5-12; Independent Directors Pet., pp. 16-18, 20-23; Debtor's Pet., pp. 13-24, 37-43). Certain of the petitioners assert that the Commission's action in making these findings was abitrary and failed to conform with legal standards. Others assert that the District Court and the Court below were casual in their review of the Commission's findings. However, their petitions reveal only a disagreement with the Commission as to the weight of the evidence.

(iii) the consolidation provided for in the Plan is not authorized by Section 77 (Independent Directors Pet., pp. 10-13; Serial Committee Pet., pp. 18-19).

(iv) the Commission unlawfully limited the capitalization of the New Orleans by physical value factors (Serial Trustee Pet., pp. 6-11).

(v) the Commission failed to comply with the requirements of Section 208(b) in disposing of surplus cash (Independent Directors Pet., pp. 18-20).

(vi) certain provisions of the Plan relating to the election of the first board of directors are unlawful (Independent Directors Pet., pp. 14-16).

This Court, in the *Western Pacific*, *Milwaukee* and *Denver* cases* supplied important and necessary interpretations of Section 77. At the time of these decisions a large part of the railroad mileage of the United States

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* *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 (1943); *R.F.C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 (1946).

was in the hands of trustees and receivers. The clarification of Section 77 which the above cited decisions furnished greatly facilitated the return of the properties of the major roads in bankruptcy and receivership to their owners. The Missouri Pacific System is the only important exception.†

Each of the prior plans in this reorganization has been hotly contested by numerous parties. Almost every conceivable objection to those plans was raised. Both the District Court and the Commission have devoted a great deal of thoughtful consideration to the problems of this reorganization. The opinions of the District Court and the reports of the Commission reveal an understanding of and adherence to the requirements of Section 77 and the principles laid down in the above cited decisions of this Court.* The return of the two prior plans to the Commission for reconsideration and revision indicates an anxious desire on the part of the Court below, the District Court and the Commission to protect the private rights of security holders as fully as is consistent with the public interest and to insure that no creditor or stockholder shall

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† At the end of 1943 the operated steam railroad mileage in receivership and trusteeship was 64,887. At the end of 1950 this mileage had been reduced to 12,223, of which 9,793 miles, or more than 75%, was operated by the Trustee of the debtors comprising the Missouri Pacific System (58th and 65th Annual Reports of the Interstate Commerce Commission—1944, 1951—App. E).

* The two prior opinions of the District Court are reported in 39 F. Supp. 436 (E.D. Mo. 1941) and 64 F. Supp. 64 (E.D. Mo. 1945) [1941 R. 2328; 1946 R. 1080]. The opinion of the District Court returning the 1940 Plan is reported in 50 F. Supp. 936 (E.D. Mo. 1943) [1946 R. pp. 111-124]. The prior reports of the Commission are reported in 239 I.C.C. 7 (1940) and 257 I.C.C. 479 (1944) [1941 R. pp. 295-473; 1946 R. pp. 646-853]. In 1947, prior to the enactment of Section 208, the Court below requested the views of the Commission as to the advisability of returning the 1944 Plan in the light of changed conditions. Following the Commission's recommendation, it returned the plan to the Commission. *Wright* v. *Group of Institutional Investors*, 163 F. 2d 1022 (8th Cir. 1947) [R. 1].

forfeit anything of value. This record is entirely inconsistent with the charges of arbitrary action by the Commission and casual review by the District Court* and the Court below.

None of the questions presented by the petitioners are comparable in importance with the type of question dealt with in the three decisions of this Court above cited. In large part the questions presented by the petitions have to do with the application of the principles laid down in those decisions to the particular facts of this case. Indeed some of the petitioners by their emphasis on physical values and book values seek indirectly to obtain a modification of the rule which makes earning power the primary test of value. Other questions are presented for the purpose of obtaining another trial of the facts. These are not the type of questions which this Court will consider.

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* Judge Moore, by whose order the Plan was approved, has had a wide experience in Section 77 reorganizations. In addition to the Missouri Pacific he also supervised administration of the *Frisco* and *Cotton Belt* estates. *In re St. Louis-San Francisco Ry. Co.*, 59 F. Supp. 417 (E. D. Mo. 1945), aff'd *sub nom. Brooks* v. *St. Louis-San Francisco Ry. Co.*, 153 F. 2d 312 (8th Cir., 1946); *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914 (E. D. Mo. 1944), aff'd with modification, *sub nom. St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. 2d 337 (8th Cir., 1946) cert. den. 330 U. S. 836 (1949). The *Frisco* plan was confirmed on November 15, 1945 (see *In re St. Louis-San Francisco Ry. Co.*, 68 F. Supp. 921 (E. D. Mo. 1946). In cooperation with the Commission, Judge Moore dismissed the *Cotton Belt* proceedings upon completion of an arrangement with creditors which avoided the need for reorganization. *Moody's Manual of Investments, Railroads*, 1951, p. 886; *St. Louis Southwestern Railway Company Securities*, 267 I.C.C. 392 (1947).

ARGUMENT

POINT I

The contention that proceedings for approval of the Plan are suspended because of the pendency of the Section 208(a)(1) proceeding does not present a question which merits review by this Court.

The Debtor and the Independent Directors assert that all proceedings relating to the Plan in this reorganization are suspended because of the pendency of the Section 208(a)(1) proceeding before the Commission (Debtor's Pet., pp. 26-33; Independent Directors Pet., p. 9; Independent Directors Motion, pp. 25-32).

The Independent Directors have sought to raise the issue by annexing to their petition a motion asking this Court to vacate the judgment below because it was entered after the filing of the Section 208(a)(1) petition (Independent Directors Motion, pp. 25-32). In the alternative their motion requests that consideration of all petitions for certiorari be deferred pending disposition by the Commission of the Section 208(a)(1) proceeding. This motion is apparently intended to avoid the requirements of the certiorari procedure. If the construction of Section 208(a)(5) involves a question which merits the consideration of this Court, it can be dealt with by granting certiorari for the specific purpose of deciding that question.

We contend that the wording and history of Section 208 plainly negatives the contentions of the Debtor and the Independent Directors and that accordingly the entry of the judgment below was not in conflict with Section 208. There is no important question for this Court's consideration.

Section 208(a)(5) provides as follows:

> "(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection (a) shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court."

It is evident from the language of the Senate Committee report* on this legislation that the basic purpose of Section 208 is to give the Commission an opportunity to review a plan in the light of changed conditions prior to final confirmation.

The time limitations governing the filing of a petition under Section 208(a)(1) are explicitly tied in with the confirmation procedure of Section 77. Thus Section 208(a)(1) permits the filing of a petition by any party at any time more than 18 months after the Commission's approval of a plan

> "but before any *order confirming the plan* shall have been entered, or, such an *order* having been entered, if an appeal from *said order* is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said *order of confirmation* or the time within which to make such appeal or to file such petition has not expired * * *." (Emphasis supplied.)

Similar language relating to confirmation is contained in Section 208(a)(2) and (3).

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* The text of Senate Report 897, in so far as pertinent to the argument of this brief, is set forth in Appendix B (p. 34, *infra*).

In the first three paragraphs of Section 208(a) the terms "order confirming", "order of confirmation" and "confirmation" are used seven times and in each instance there can be no doubt that Congress was referring to confirmation or an order of confirmation in the sense in which it is used in Section 77(e). The use of the term "approval" on four occasions and "consummated" on three other occasions in Section 208(a) leaves little room for doubt that Congress was perfectly well aware of the separate and distinct procedures for approval and confirmation laid down in Section 77(e) and of the established terminology employed in railroad reorganizations.

There is no reason for supposing that in using the phrase "proceedings for confirmation of the plan" in Section 208(a)(5), Congress meant anything other than the usual proceedings directly related to confirmation in its strict sense.* Section 208 was enacted as a part of Public Law 478 (approved April 9, 1948) and constituted Section 3 thereof. Section 2 thereof (commonly called the "Mahaffie Act"†) permits a carrier in reorganization under Section 77, with the permission of the District Court, to file a "Mahaffie Act" plan with the Commission. Section 2 provides that "upon granting of such permission, *such proceeding* [under Section 77] *so far as it relates to a plan of reorganization, shall be suspended* * * *." (Emphasis supplied.) Plainly, Congress knew how to phrase a provision which would suspend all proceedings relating to a plan when it so intended. In Section 208 Congress intended only to stay the hand of the court in exercising its function of confirmation. The procedures developed and the language used in Section 208 precisely effect that intention.

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* Legal terms in a statute are presumed to have been used in their legal sense. 2 *Sutherland, Statutory Construction*, pp. 438-39 (3rd ed., 1943), and cases there cited.

† Interstate Commerce Act, Sec. 20b (49 U.S.C.A. §20b).

The issues sought to be raised in this Court involve *approval* of the Plan, not *confirmation.** There can be no "collision" between this Court's action in approval proceedings and the Commission's actions under Section 208. If certiorari is granted, it will be to determine an important question of law arising out of the record which was before the Commission when it certified the Plan and the record in the District Court in the proceedings for approval of the Plan. The function of approval is assigned by Section 77(e) to the courts. None of the issues raised in the approval proceedings is or can properly be before the Commission in the Section 208(a)(1) proceedings.

The function of the Commission in the Section 208(a)(1) proceeding is to appraise events which have transpired since its certification of the Plan in order to determine whether reexamination or revision of the Plan is necessary.

If the Commission finds that reexamination and revision are unnecessary, any action taken by this Court on the petitions will be neither "unseemly" nor a "waste of time and energies" of the Court—indeed the progress of the Plan toward consummation will in that event be materially expedited. If the Commission finds that the Plan should be reexamined and revised, it should have the benefit of this Court's determination of any issue which merits review for its guidance in the subsequent Section 208(b) proceeding. For example, each of the

* After entry of the approval order, the Plan was submitted to security holders for acceptance or rejection pursuant to Section 77. The Plan was rejected by only three of the 17 classes to which it was submitted, viz., the Missouri Pacific preferred stockholders (Class 2), the holders of the New Orleans publicly-held capital stock (Class 3) and the Serial bondholders (Class 19). Rejection of the Plan by these classes rendered it necessary for the District Court to reexamine the Plan. Confirmation hearings were held in June 1951 and briefs filed. Those proceedings, being "for confirmation", are suspended pending determination of the Section 208 proceeding.

plans heretofore issued in this reorganization has provided for consolidation of the debtors. It is urged that this provision is unlawful. The courts below have held that the Commission has power to authorize a consolidation under Section 77 (R. 937-39; Tr. 21-25). In view of the Commission's repeated findings that such consolidation is in the public interest, there can be no real doubt that any new or modified plan which the Commission may hereafter approve, if the Plan is returned, will provide for consolidation. Thus, if this Court is of the opinion that an important question is presented by this contention (or any of the other contentions of the petitioners), any future deliberations of the Commission and the District Court will be substantially aided, not hindered, by the grant of the writ and prompt determination of the issue.

To us it seems obvious that the Debtor and the Independent Directors are urging a strained construction of the plain language of Section 208 which is inconsistent with the intention of Congress and which would convert that legislation into an instrument to hinder and delay creditors. It is most unlikely that any of the lower Federal courts will adopt such an interpretation of this legislation should the question ever again arise. Thus there is no need for a pronouncement of this Court on the matter. It would also seem prudent to permit the Commission and the lower Federal courts to acquire some experience in the administration of this new law before this Court undertakes to interpret it. Such experience should be of invaluable aid to this Court.

POINT II

The findings of the Commission as to maximum permissible capitalization should not be reviewed by this Court.

This Court will not grant certiorari "merely to review the evidence or inferences drawn from it" (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 (1938), *United States* v. *O'Donnell*, 303 U. S. 501, 508 (1938)); nor will it disturb the concurrent findings of the courts below unless they are shown to be "clearly erroneous". *Faulkner* v. *Gibbs*, 338 U. S. 267, 268 (1949), *Williams Co.* v. *Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942), *Allen* v. *Trust Company*, 326 U. S. 630, 636 (1946), Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), pp. 657-59. The "two court" rule operates as well upon consideration of applications for certiorari as in the decision of cases on the merits. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), pp. 659-661.*

Some of the petitioners pay lip service to the rules which control court review of the findings of the Commission concerning matters which are affected with the public interest (*e.g.*, Alleghany Pet., p. 29, question 1). But upon analysis it will be found that the questions which the petitioners raise as to the findings pertain only to the weight of the evidence. The Missouri Pacific equity interests question the Commission's findings as to maximum permissible capitalization of the System and component debtors. It is asserted that in determining capitalization the Commission gave undue weight to past earnings,

* The Court of Appeals decisions cited on pages 36-37 of the Alleghany Petition are, of course, not in conflict with the "two court" rule.

improperly computed physical values and generally ignored evidence of the improved condition of the System and of the area it serves. These parties emphasize the high earnings of the System since 1941, the substantial increase in physical values and other favorable facts which the record discloses. They overlook the opinions of this Court which suggest caution in the use of statistics which reflect transitory conditions such as war. *Milwaukee* case, 318 U. S. 523, 542-544; *Western Pacific* case, 318 U. S. 448, 506-509. They completely ignore the adverse factors which have affected railroads since 1945, such as the growing losses of rail traffic to competitive forms of transportation and the spiralling cost of labor and materials.

Of necessity the determination of capitalization and earning power requires the weighing of many complex factors. It involves knowledge of the national transportation economy, of traffic sources and potentialities, of the effect of economic developments on railroad traffic and revenues, and of trends in earnings and costs of operation. It involves an attempt to foresee the future. It vitally concerns the public interest. The appraisal of these factors has been entrusted to the Commission and, if legal standards are followed, its findings are given conclusory effect by Congress and this Court. Section 77: *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468-77 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U. S. 523, 538-42 (1943).

The wisdom of committing this determination to an expert administrative agency, equipped to deal with the mass of evidence that inevitably accompanies a railroad reorganization, cannot be doubted. At the time of issuance of the Plan, this proceeding had been pending for over 16 years. The Commission and the District Court had dealt with testimony, exhibits, orders, financial statements

and other pertinent data comprehending thousands of printed pages of record.*

The petitioners invite this Court to review this enormous record and, in effect, "to try the case *de novo.*" Such an invitation is ordinarily declined. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 596-7 (1951). It should be in this case. None of the three principal contentions of the Missouri Pacific equity interests demonstrates error in the Commission's findings.

1. The contention that the Commission, in making its findings as to earning power, relied on a "depression forecast" and ignored war earnings and recent favorable developments.

Alleghany complains that the forecast of earnings made by the Commission was "preponderantly based" on the so-called "normal year" forecast of the Trustee which was "prepared and presented to the Commission in the depth of the world's worst depression". It is argued that the Commission ignored the changes in the fundamental character of the System's traffic, changes in economic conditions, economic improvements in the Southwest and "all the other undisputed evidence in the record as to the present and probable future increased earning capacity of the System" (Alleghany Pet., pp. 14-24, 34-35; see also Independent Directors Pet., pp. 16-18 and Debtor's Pet., pp. 16-24, 37-41). It is claimed that the Commission in 1948

* The printed record before this Court constitutes over 4500 pages of testimony, reports, orders and exhibits. The printed record in the District Court (only a fraction of which is included in the printed record before this Court) immediately prior to the issuance of the Plan consisted of over 28,000 pages of petitions and orders dealing with the administration of the debtors' estates, reports and financial statements of the debtors. The printed record in the District Court is transmitted to, and forms part of the record before, the Commission. Hundreds of additional pages of testimony bearing on developments since 1949 are now under consideration by the Commission in the pending Section 208 (a)(1) proceeding.

merely revised the Trustee's "normal year" forecast to reflect expected increases in citrus and chemical traffic, and in so doing "arbitrarily" reduced Mr. Neff's estimate by over $1,000,000 (Alleghany Pet., pp. 18, 23, 34; Debtor's Pet., pp. 37-38). The Commission has specifically stated that its "determinations of a normal year's earnings for each of the three principal debtors and for the system are not the result of mere additions of prospective earnings from citrous and chemical traffic to the trustee's normal-year forecasts" (Vol. LII, p. 28655). In arriving at its forecast of normal year earnings, the Commission considered the earnings data for the five-year period (1937-1941) immediately preceding the entry of the United States into World War II and the seven-year period (1942-1948) which includes the war years and the three years immediately following the war (Vol. LII, pp. 28541-28542). It also considered extensive testimony and exhibits regarding recent developments in the Southwestern territory, including the chemical and citrus growth, increases in population in the System territory, increases in income payments, wages and salaries and other statistics which tend to indicate that the Southwestern territory has had a greater proportion of growth in business and agricultural activity than the rest of the United States (Vol. LII, pp. 28534-28541, 28655, 28667; Tr. 33-4). The Commission concluded that the average annual volume of traffic and operating revenues in the future will be larger than the average for the five or ten years immediately preceding the war. The Commission commented:

> "However, in that event, the cost of labor and materials will also be on a higher level. So far as recent experience indicates, these costs have represented a considerably greater proportionate increase than have the revenues. The resulting earnings available for interest have not been commensurate with the increased traffic volume. In the

> event of a business depression ('industrial contraction') both operating revenues and costs will doubtless suffer a serious decline but past experience has shown that the traffic volume and revenues will decrease in a greater degree proportionally than will expenses" (Vol. LII, p. 28542).

The District Court, having considered the entire record, found that the Commission's findings and conclusions were supported by the evidence (R. 949, 919).

The charge that the Plan is based on a "depression formula" for earnings is controverted by the record. In 1940 the Commission's estimate of the System's normal year earnings at about $22,000,000 was substantially in excess of actual System earnings during the 1930's. Only in the first two years of that period did System earnings equal or exceed $22,000,000 (1941 R. Vol. II, pp. 331-335; Vol. LII, p. 28542). The Commission's forecast of $25,450,000 exceeds by over $14,000,000 the average annual earnings for the period 1932-1940. It is $10,000,000 in excess of the highest annual earnings in that period. The new capitalization cannot be serviced adequately with income available for interest of $25,450,000. Such earnings will provide nothing for the new common stock, Class B, and will amount to less than 5% on the capitalization represented by the new common stock, Class A.* As the inflation of prices continues, an increasing proportion of earnings will be required for replacement of plant and equipment. Only in periods of relatively high

* Under the Plan the total annual charges through the dividend on the new preferred stock will amount to $21,362,252, exclusive of capital expenditures fund and sinking funds (R. 28638). Out of the normal year earnings of $25,450,000, there will remain, after payment of the preferred stock dividend, $4,087,252. Sinking fund requirements of the Plan and the need for substantial expenditures for replacements and improvements will prevent the distribution by way of dividends of a large portion, if not all, of this balance of earnings in the normal year.

earnings can the holders of new Class A and Class B common stocks expect to receive dividends. It is plain that the new capitalization was not predicated on earnings of the 1930's.

2. The contention that the Commission failed to accord proper weight to improvements.

Alleghany and the Debtor urge that the vast improvements in System properties, especially the dieselization program, have been accorded insufficient recognition (Alleghany Pet., pp. 13-14, 17-18; Debtor's Pet., pp. 20-22). They emphasize the dollar amount of expenditures for additions and betterments, but fail to show that increased earnings will result.

It is apparent from the Commission reports that the Commission was fully aware of the improvements that had been and were being made in the physical plant of the System and of the economies of operation to be realized therefrom. The Commission found that the probable normal year income determined by it "sufficiently reflects any economies of operation resulting from improvements made to the debtor's properties since 1944" (Vol. LII, pp. 28545, 28542-45, 28555, 28511, 28667).

Prior to the issuance of the Plan in December, 1949, the Commission also had before it the petitions filed, and orders entered, in the District Court in the years 1948 and 1949 reflecting the further progress of the Trustee's program for dieselization and other extensive additions and betterments.

The mere statement of the dollar expenditures for improvements gives this Court no basis for appraising their effect on earning power.* A considerable portion of

* As the Commission has stated, railroad property "must be properly maintained and replacement spending does not necessarily result in increased net earnings. Such expenditures are often required to preserve earnings, particularly in view of competitive conditions" (Vol. LII, p. 28545).

such expenditures is required for necessary replacements to insure effective and safe operation.* Substantial amounts have gone into the extensive program of dieselization. That has been a vital necessity to maintain the competitive position of the System. Spiralling costs of labor and materials have added millions of dollars to the cost of improvements. A very substantial proportion of the cost of improvements is not reflected in increased earning power. This is clearly an area in which the expert judgment of the Commission is required.

3. The contention that reproduction cost was improperly computed.

Among the elements of value considered by the Commission was reproduction cost (Vol. LII, pp. 23510-13; 28553; 28667-68)**.

Alleghany and the Debtor urge that the Commission should have adopted a multiplier of 227 (or more) in com-

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* Alleghany specifically refers to "installation of heavier rails, shorter and permanent steel bridges and creosoted ties and bridge material and grade reductions" (Alleghany Pet., p. 14). In the *Denver* case this Court took note of the fact that "Railroads, even in reorganizations, must make additions to take care of public needs or to lower operating costs" (328 U. S., at p. 515).

** Alleghany offers the unique suggestion that (absent a showing that a railroad has had an opportunity through fair rates to earn a proper return) its value for reorganization cannot be fixed at less than its reproduction cost less depreciation. (Alleghany Pet., pp. 38-46). Not a single reorganization case is cited in direct support of this contention. This Court has thoroughly discussed the proper basis for determining reorganization value and has distinguished value for rate making purposes from reorganization value. (*Milwaukee* case, 318 U. S. at pp. 539-40; *Western Pacific* case, 318 U. S. at pp. 482-3.) Even if value for rate making purposes were controlling, Alleghany has failed to demonstrate error. The notion that rates must yield a fair return on reproduction cost has been repudiated by this Court. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Federal Power Commission* v. *Pipeline Co.*, 315 U. S. 575 (1942); See also Robert L. Hale "Utility Regulation In The Light Of The Hope Natural Gas Case", 44 Col. L. Rev. 488, 496 (1944); Robert Swaine "A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act", 56 Harv. L. Rev. 1193, 1196 (1943).

puting reproduction cost (Alleghany Pet., pp. 8-11, 33-34; Debtor's Pet., pp. 41-42). This was the "spot" multiplier for 1946 (Vol. LII, p. 28668), based on the then current actual costs of construction (R. 156-7). The multiplier of 175 used by the Commission is a "period price multiplier", which reflects construction cost trends (Vol. LII, pp. 28510-11, 28668; R. 468-69).

The Commission was of the opinion that the use of a "spot multiplier" is not "proper in determining capitalization" in reorganization (Vol. LII, pp. 28667-68; see also R. 921).*

Alleghany's contention merely indicates a disagreement with the Commission and the Bureau of Valuation as to the weight to be given to current construction costs in determining reorganization value (Tr. 30). This is a field in which the Commission's conclusions are binding. Alleghany has failed to show that, in reaching its conclusions, the Commission has disregarded legal standards.**

In general, the petitioners have emphasized all the favorable factors which may influence earnings, particularly as reflected in the high earnings during and since World War II. In the *Milwaukee* case this Court indicated that war earnings are an unreliable criterion of

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* This position is quite understandable. As appears from the Alleghany petition (p. 8), the weighted average cost index for the Southwestern area (Region VIII) has equalled 227 in only 4 years in the 35-year period 1915-1949. Indeed the multiplier of 175 used by the Commission has been equalled in only 12 years during that period, four of which were in the inflated 1920s and the remainder of which were in the World War II and the post-war period.

** If there is any substance to the argument (Alleghany Pet., pp. 10-11) that the Commission in *Ex parte 175 (Increased Freight Rates, 1951,* 281 I.C.C. 557 (1951)) has belatedly recognized the inadequacy of its valuation figures, the Commission will have an opportunity to reconsider in the light of changed conditions its valuation of the debtors' properties in the pending Section 208 proceeding. The Bureau of Valuation filed a new valuation report in those proceedings in November, 1951.

earning capacity (318 U. S. at p. 543). In this case, in *Rutland Railroad Company Reorganization,* 267 I.C.C. 153 (1947) and in its Sixth Supplemental Report in the *Florida East Coast Railway Company Reorganization* (decided October 25, 1951), the Commission has properly expressed its doubts that the high earnings in the post-war years are a fair guide to probable future earnings (Vol. LII, pp. 28560, 28534). The Commission, unlike the appellants, recognized the adverse as well as the favorable factors which may influence earnings. The increasing competition from other forms of transportation,† increasing costs of operation and the vulnerability of the System to floods and frosts have been considered by the Commission (Vol. LII, pp. 28560, 28655; 1946 R. Vol. II, p. 712; 1941 R. Vol. III, pp. 807-815, 1101; Vol. IV, pp. 1494-5). These, together with the past performance of the System,* have been weighed against all of the favorable factors to which the petitioners refer.

The record amply supports the Commission's conclusions with respect to the earning capacity and the capitalization of the System and its constituent debtors (Vol. LII, pp. 28501-64, 28656-68; R. 919; Tr. 25-27). The arguments of the petitioners merely indicate disagreement as to the weight to be accorded to certain factors and the conclusions to be drawn from the evidence as a whole (Tr. 30). This is an entirely insufficient reason for this Court to review the findings of the Commission or of the Courts below.

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†R. 845-47; In its recent Annual Reports, the Commission has stressed the diversion of traffic from rail to competitive forms of transportation (Sixty-Third Annual Report, pp. 3-4; Sixty-Fourth Annual Report, pp. 1-3, 20; Sixty-Fifth Annual Report, pp. 2-4).

*1941 R. Vol. II, p. 333; Vol. LII, p. 28542: See p. 17, *supra.*

POINT III

In considering the petitions this Court should ignore the evidence as to changed conditions which was submitted to the Commission in the Section 208(a)(1) proceedings and to the District Court in the hearings on confirmation.

Not only do Alleghany and the Debtor invite this Court to review the findings of the Commission and the District Court on the extensive record before this Court—they also ask this Court to test those findings in the light of evidence which was not before the Commission when it certified the Plan or before the District Court in the approval proceedings. Alleghany, the Debtor, the Independent Directors and the Serial Committee rely extensively on evidence introduced at the confirmation hearings (held in June 1951) and at the Commission hearings in the pending Section 208(a)(1) proceeding (Alleghany Pet., pp. 3-29; Independent Directors Pet., pp. 20-23; Debtor's Pet., pp. 24, 39-40, 47-58; Serial Committee Pet., pp. 5, 7, 9, 11). The necessity for this Court to test a plan for changed conditions* in an approval proceeding has been eliminated by the procedures established by Section 208. Indeed it is wrong to ask this Court to appraise such evidence in the absence of any supporting record and without the benefit of the findings of the Commission or the District Court. The futility of attempting to draw any conclusions from these references to evidence introduced at the Section 208 and confirmation hearings may be readily demonstrated:

1. Certain of the petitioners emphasize that reported System earnings available for interest in 1950 were $45,595,589, or approximately $5,000,000

* *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 506-509 (1943).

in excess of comparable earnings in 1948 (Alleghany Pet., pp. 16, 35; Debtor's Pet., p. 40; Independent Directors Pet., p. 21). At the recent Commission hearings evidence was introduced indicating that reported 1950 earnings contained a large item of non-recurring income attributable to prior years. There was also evidence tending to show that earnings have been declining since 1948.

2. Alleghany emphasizes testimony (introduced at the confirmation hearings) that annual savings in operating expenses of approximately $13,000,000 will result in 1951 from the Trustee's program of dieselization (Alleghany Pet., p. 34). Other evidence introduced at these hearings plainly demonstrated that savings from dieselization effected in the period 1948-1951 are more than offset by increases in wages and the cost of materials in that same period.

3. The Debtor seeks to demonstrate the improved earning power of the System by quoting at length from the testimony of T. C. Davis (Debtor's Pet., Appendix B, pp. 47-58). The figures contained in this testimony were accepted subject to verification. None of the cross-examination of this witness bearing upon his experience and qualifications is printed in the Debtor's petition. This Court does not have the benefit of the Commission's appraisal of this witness' testimony. Such testimony has no place in a petition before this Court.

In offering the foregoing examples we do not seek to demonstrate in this Court that there have been no changes in conditions since 1949. That is an issue now pending for determination before the Commission. The examples are merely offered to show that in the absence of the

record of proceedings in the confirmation and Section 208 proceedings, this Court cannot possibly evaluate and should not consider any part of the evidence introduced in those proceedings which is relied upon by the petitioners. It was the intention of Congress in enacting Section 208(a)(1) that before final confirmation the courts might have the Commission's expert appraisal of changes, facts and developments occurring after certification of the plan. Thereby this Court was to a large extent relieved of the difficult task of weighing the effect of such changes. This Court will not now attempt to pass judgment on the issue of changed conditions which is before the Commission in the Section 208(a)(1) proceeding and before the District Court in the confirmation proceeding.

POINT IV

The contention that the consolidation proposed in the Plan is unlawful does not present an important question. No conflict of decisions is presented.

The Independent Directors and the Serial Committee contend that the Commission lacked power under Section 77 to provide for the consolidation of the debtors into a single reorganized company.

The authorities are perfectly clear that the Commission may provide for such consolidation. *In re Chicago, Rock Island & Pacific Ry. Co.*, 168 F. 2d 587 (7th Cir., 1948), cert. den. *sub nom. Texas* v. *Brown*, 335 U. S. 855 (1948); *In re Florida East Coast Railway Company*, 81 F. Supp. 926 (S. D. Fla. 1949), aff'd *sub nom. Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538 (5th Cir., 1950), cert. den. 339 U. S. 929 (1950); see also *Callaway* v. *Benton*, 336 U. S. 132 (1949); and see Tr. 24 and cases

there cited. No decision cited by the Independent Directors is in conflict with these cases.

The report of a Congressional committee in 1946 (R. 1075-76; Independent Directors Pet., p. 11) criticizing the construction placed on Section 77(f) by the Commission and the courts in this and other proceedings, leads to a conclusion opposite to that drawn by the Independent Directors. The fact that the matter was called to the attention of Congress and that it failed to act on the suggestions of the Congressional committee indicates that Congress is quite satisfied with the interpretation which the Commission and the courts have placed upon Section 77(f). *Keystone Mining Co.* v. *Gray,* 120 F. 2d 1 (3rd Cir., 1941).

No party representing creditors or stockholders (other than the Serial Committee) complains of the consolidation. The Serial Committee represents only a fraction of the Serial Bonds. Neither Morris, *et al.* (Cause No. 415), nor the Serial Trustee (Cause No. 524), both of whom represent the interests of Serial bondholders, seeks to raise the issue. Obviously no question of general importance is presented.

POINT V

The contention that the Commission unlawfully limited the capitalization of the New Orleans by physical value factors does not present an important question.

The Serial Trustee contends that the Commission arbitrarily limited the valuation of the New Orleans by physical factors in disregard of its earnings. This argument is substantially the same as the argument advanced by

Morris, *et al.* in their Petition 415 which has heretofore been considered and denied by this Court. This Court is respectfully referred to Point I of the joint brief of the Group, the General Mortgage Committee and the Convertible Trustee in opposition to Petition 415.

Alleghany and the Debtor contend that the Commission has dealt inconsistently with physical factors of the Missouri Pacific and the New Orleans. They urge that physical values have been permitted to limit capitalization and value in the case of the New Orleans, and have been given insufficient weight in valuing the Missouri Pacific (Alleghany Pet., pp. 46-48; Debtor's Pet., p. 20). As we have shown in Point I of our opposing brief in Cause No. 415, physical values did not operate to limit the value of the New Orleans. With respect to the Missouri Pacific, earning power clearly would not support a capitalization based on reproduction cost.

POINT VI

The contentions concerning the provision of the Plan dealing with the selection of the first Board of Directors present no important question.

The Independent Directors complain of the procedure for designation of the initial Board of Directors of the reorganized company (Independent Directors Pet., pp. 14-16). Much of their statement concerning this subject is mere assertion without reference to the record.

Section U of the Plan permits certain of the mortgage trustees and bondholders' representatives to designate the initial Board of Directors, one-third of whom shall serve for one year, one-third for two years and the remaining one-third for three years. The classification and

tenure of the first Board is determined by the reorganization managers subject to court approval. Seven members of the initial Board must be residents of the territory served by the System, and all must be approved by the District Court (Vol. LII, pp. 28603-12, 28676-79, 28753-54).

Section 77(b)(5) provides that a plan of reorganization "shall provide adequate means for the execution of the plan * * *" which may include any appropriate "provisions not inconsistent with this section." Section U was included in the Plan in recognition of the desirability of insuring "a degree of stability of management in the early years of the reorganized company" (Vol. LII, p. 28611). The Independent Directors cite no authority for their contention that such provision is unlawful. They fail utterly to demonstrate that the fairness of the Plan is in any way affected.

The Commission "has experience in the matter of starting the new companies off when reorganized" (Tr. 35) and the periods of the initial directorships "are very short in the life expectancy of the new company" (Tr. 36). It is clearly in the public interest that the reorganized company shall be assured of a stable management in the period immediately following consummation of the Plan. The determination of how such stability can be insured is a matter for the judgment of the Commission and the District Court. The requirement that all initial Directors must be approved by the District Court constitutes adequate protection against improper selections (Tr. 36).

The Independent Directors have failed to show an abuse of discretion by the Commission or to demonstrate the importance of the question they seek to raise. Nor have they shown that they represent any parties who will be entitled to vote the new common or preferred stock.

A showing that rights personal to a petitioner are injured or in danger of injury is jurisdictional. *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405, 406-7 (1900); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), Sec. 297, 298 and cases therein cited.

POINT VII

The contention that the Commission has made improper use of the cash balances of the debtors presents no important question.

The contentions of the Independent Directors with respect to the use of surplus cash are stated in such general terms that it is difficult to understand what their specific objections to the Plan are. We infer from the statements made at pages 18-20 of their petition that the "new reorganization principle" which they find in Section 208(b) makes it mandatory for the Commission to include in a plan specific provision for the retirement of debt at a discount with surplus cash.

They point to the substantial cash balances of Missouri Pacific and the System at the end of 1948 and imply that all such amounts in excess of "liberal working funds" were available for purchase of debt at a discount (Independent Directors Pet., p. 18).

Section 208(b) does not establish any "new reorganization principle" with respect to the use of surplus cash. The portion of Section 208(b) quoted by the Independent Directors enumerates some of the factors which the Commission is to consider if a plan is returned at the conclusion of a Section 208(a) proceeding. There is not a word in Section 208(b) that requires the Commission to make provision in a plan for retirement of debt at a discount.

The Commission was fully aware of the proceedings in Congress which resulted in this legislation,* and of the changes, facts and developments emphasized in Section 208(b), when its Fourth and Fifth Supplemental Reports were issued. It gave extensive consideration to the debt reduction, including substantial purchases of System debt at a discount, which had been accomplished since the issuance of the 1944 Plan (Vol. LII, pp. 28471-77, 28576). This is reflected in the improved treatment of security holders provided in the Plan. Its discussion of cash reserves and cash requirements of the System (Vol. LII, pp. 28521-26; 28575-80), to which the Independent Directors fail to refer, makes clear the equitable reasons for the allocation of cash to seniors and the necessity of maintaining cash balances for working capital, reserves and Plan requirements. The District Court found that the Plan made proper use of available cash (R. 942; See also Tr. 35).

The argument of the Independent Directors is based on a misapprehension of Section 208(b), of the provisions of the Plan and of the facts in the record. Plainly, no important question is presented.**

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* Section 208 became law on April 9, 1948, more than twenty months prior to the certification of the Plan. Section A of the Plan permits the Trustee to continue his debt retirement program, including the purchase of System obligations at a discount (Vol. LII, pp. 28689-91).

** Likewise the assertions of Alleghany and the Serial Committee as to increases since December 31, 1947 in the value of investments, in net quick assets, in net worth, and other book values, present no question for this Court to consider. (Alleghany Pet., p. 13; Serial Committee Pet., pp. 5-6, 8-9.) They are not based on facts of record before this Court and no attempt has been made to correlate the claimed increases with earning power. The last paragraph of Section 77(e) deals with the valuation of "property used in railroad operation". Nothing in that paragraph required the Commission to base its valuation of the properties on book values.

CONCLUSION

The petitions should be denied for the reason that they fail to present a conflict of decisions or an important question which should be reviewed by this Court. The motion of the Independent Directors (i) in so far as it requests that the judgment of the Court below be set aside, should be denied because it fails to comply with Section 1254 of the Judicial Code (28 U.S.C.A. §1254) and because the entry of the judgment of the Court below was not enjoined by Section 208(a)(5) and (ii) in so far as it requests postponement of consideration of the petitions, should be denied because no useful purpose would be served thereby and because such a postponement could result in a further long delay of these proceedings.

Respectfully submitted,

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Dated: February 15, 1952.

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APPENDIX A

TABLE SHOWING THE EXTENT TO WHICH SYSTEM CLAIMS AND INTERESTS ARE SATISFIED ON THE BASIS OF MARKET VALUES

Class of Existing Securities	Total Claim	Market Value of New Securities and Cash as of March 31, 1951	Unsatisfied Portion of Claim	% Total
First Mortgages	$397,961,789	$352,859,602	$ 45,102,187	11.3
Junior Debt or Equivalent	209,901,769	114,449,339	95,452,430	45.5
Total Debt	607,863,558	467,308,941	140,554,617	23.1
Preferred Stock	163,171,230	10,904,533	152,266,697	93.3
Total Claims prior to Common	$771,034,788	$478,213,474	$292,821,314	38.0

This exhibit is identical with an exhibit annexed to our brief in the Court below. If market values as of a recent date had been used instead of the March 31, 1951 values, the result would not be substantially different.

The total claims are taken from Appendix D, Vol. LII, p. 28637, and have been adjusted to exclude equipment obligations and to reflect acquisitions of securities (not already reflected in Appendix D) by the Trustee after the effective date of the Plan. The market values shown in the second column of figures above are bid prices taken from the Wall Street Journal of April 2, 1951. The figures in this column also include the cash allocated in the Plan. The quotations for the new common stock, Class A, have been used for the new common stock, Class B, because the latter is not traded in the "when-issued" market. The new first mortgage bonds, Series A (or collateral trust notes) issuable to holders of New Orleans first mortgage bonds are included in the second column of figures at 100 because the Plan contemplates that they will sell at par at the time of consummation (Vol. LII, pp. 28711-12).

APPENDIX B

Extracts from Senate Report No. 897 accompanying H. R. 2298, 80th Congress, 2nd Session, 1948:

"EXPLANATION OF BILL BY PARAGRAPHS

* * *

"Section 3, also a Senate amendment, consists of two subsections, the former of which is divided into 5 paragraphs. These will be considered ad seriatim.

"Paragraph 3a (1) provides, in the case of plans of reorganization hereafter approved by the Commission in section 77 proceedings, that 18 months after the Commission has either certified a plan to a court or had disposed of a like petition filed under this paragraph, any party affected may file a petition and as a result it shall be the duty of the Commission to report to the court any changes, facts, or developments which have taken place since the approval of the plan and which make it necessary or expedient for the Commission to examine or revise the plan. It should be emphasized, however, that such a petition cannot be entertained in those cases where an order confirming the plan has been entered, unless an appeal from such an order is pending in the circuit court of appeals, or the matter is pending in the Supreme Court on a petition to review any order of a lower court dealing with the order of confirmation, or the time to make such an appeal or file such a petition has not expired. These same safeguards are also contained in subsequent paragraphs to make certain that orderly court procedures cannot be displaced or interfered with.

"In the opinion of the committee, the need for this type of reexamination and reconsideration is of the greatest importance where bankruptcy proceedings are pending

for many years, as they generally are in most railroad cases. Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes considerably in the long periods which elapse from the time the Commission approves a plan until it is finally confirmed. There is no requirement here that the plan be changed or altered; that lies within the discretion of the Commission. But Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed. Witnesses representing some railroads and some security holders have testified that this has resulted, in many cases, in the consummation of some reorganizations which have failed to render equity to certain classes of security holders who had no remedy or recourse at law. The committee believes that the law should be clarified and the duty of the Commission made plain. This paragraph, and the succeeding paragraphs of this section, are intended to remedy this lack of liaison between courts and the Commission.

"Paragraph 3a (2) is substantially similar to the paragraph above, but permits the court, instead of the Commission, to receive a petition and give consideration to whether changes, facts, or developments have occurred which make it necessary or expedient for the Commission to reexamine, revise, or reconsider a plan. If the court so finds, it may return the plan to the Commission for such revision. The same safeguards contained in paragraph (1) to prevent improper action in those cases which have achieved a legal status beyond which changes should not be entertained are included in this paragraph.

"Paragraph 3a (3) is a parallel provision to the two preceding paragraphs and merely provides that in certain reorganization cases still pending the Commission must report to the court any changes, facts, or developments which have taken place since December 31, 1939, and which were not provided for in the plan it approved. Again, the safeguards contained in the two preceding paragraphs to prevent disruption of legal proceedings already too far advanced are included in this paragraph.

Paragraph 3a (4) is merely a procedural provision to insure that if a plan is returned to the Commission in accordance with the provisions of section 3 of the bill, all of the proceedings will be governed by subsection (d) of section 77 of the Bankrutcy Act, as amended.

"Paragraph 3a (5) is also a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission.

"Subsection (b) of this section provides for a public hearing in the event a plan is returned to the Commission. It spells out the factors that the Commission must evaluate and on which parties will offer evidence in reconsideration of a plan. The Commission, after such hearing and consideration, may modify or refuse to modify the plan. If the former, it certifies the modified plan to the court and proceedings continue on the modified plan under section 77 as they did on the original plan. If the Commission refuses to modify, it also transmits its order and the transcript for court consideration. If the court finds the

Commission's refusal to modify the plan is based on sufficient findings and is supported by the record, the original section 77 proceedings shall continue as if the plan had never been returned to the Commission. If, however, the court does not so find, it shall return the plan to the Commission for further consideration, after which the Commission shall again certify the plan to the court. The entire procedure here is consistent with the authority and dignity of a court considering bankruptcy cases in which equity is required to be done. It places upon the court the authority to determine whether the facts support the Commission's decision and to that degree places a check upon arbitrary and capricious action by administrative bodies. The committee does not intend that the plan shall become a football between the Commission and the courts; it believes that while courts will give due weight to the facts as ascertained by the Commission, the Commission will also respect the judgment of the courts, particularly in view of the fact that in these cases the court has custody of the property and is intimately familiar with the pertinent facts."

APPENDIX C

Section 3 of Public Law 478, Approved April 9, 1948 (62 Stat. 167; 11 U.S.C.A. §208), referred to in the foregoing brief as "Section 208".

"Sec. 3(a) Notwithstanding any other provision of law—

"(1) with respect to any plan of reorganization or modified plan of reorganization approved by the Interstate Commerce Commission under the provisions of section 77 of the Bankruptcy Act, as amended, subsequent to the effective date of this Act, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bank-

ruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

"(2) if, with respect to any plan of reorganization or modified plan of reorganization approved by the Commission subsequent to the effective date of this Act, the court before which such plan is then pending, for approval or confirmation, no order of confirmation having been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, upon petition of any party to the proceeding and either with or without a hearing, shall find that changes, facts, or developments have occurred since the approval of such plan by the Commission which were not provided for in the plan and which make it necessary or expedient, in the opinion of the court, that the Commission reexamine and reconsider and revise such plan in order to insure that the plan [if] consummated and put into effect shall then, in the opinion of the court and the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section, and section 77 of the Bankruptcy Act, as amended, the court shall return the plan to the Commission for such reexamination, reconsideration and possible revision;

"(3) with respect to any plan of reorganization or modified plan of reorganization which, on the date of enactment of this Act, is before any district court for approval or confirmation, no order of confirmation having been

entered, or, such order having been entered, if an appeal from said order is pending in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such an appeal or to file such petition has not expired, it shall be the duty of the Commission, upon petition of any party to the proceeding, to report to such court any changes, facts, or developments which have occurred since December 31, 1939, which were not provided for in the plan and which, in the opinion of the Commission, make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that if consummated and put into effect, such plan shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bankruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

"(4) in the event of the return of a plan to the Commission pursuant to the provisions of this subsection (a), the proceedings with respect thereto shall be governed by the provisions of subsection (d) of section 77 of the Bankruptcy Act, as amended;

"(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection (a) shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pend-

ing disposition of the petition by the Commission and certification of its action thereon to the court.

"(b) As to any plan so returned to the Commission by the court, the Commission, upon further hearing at which all parties may appear and submit evidence as to prospective earning power and other relevant facts, and upon consideration of all changes, facts, and developments which have occurred since the date of approval of the plan by the Commission (or which have occurred since December 31, 1939, in the case of plans which on the date of enactment of this Act were pending before, but had not been confirmed by, the court by order which shall have become final), including, without limitation, for such period total railway operating revenues, operating expenses and other charges, net earnings, the full effect of amortization deductions on earnings of past and future years, improvements to property, the effect of released collateral through past or future payments of loans, cash and net current assets, retirements and purchases of debt, including retirements and purchases at a discount that have been made or that can reasonably be made, adjustment and reduction of interest rates on outstanding debt that may be made, shall, in a supplemental report and order, modify, or refuse to modify, any plan which it has approved, stating the reasons for such modification or for its refusal to modify the plan. The Commission, if it modifies the plan, shall certify the modified plan to the court, together with a transcript of the proceeding before it and a copy of its report and order approving the modified plan. Thereafter proceedings upon the plan shall be governed by the provisions of subsection (e) of section 77 of the Bankruptcy Act, as amended, and of this section. If the Commission refuses to modify the plan, it shall

transmit to the court a copy of its report and order, together with a transcript of the proceedings before it. Thereafter, if the court shall find that the refusal of the Commission to modify the plan is based on sufficient findings and is supported by the record, the proceeding upon the plan shall continue as if the plan had not been returned to the Commission; otherwise the court shall return the plan to the Commission for further consideration. Upon such consideration, the Commission shall again certify the plan to the court with such modifications, if any, as it may find necessary, and thereafter further proceedings upon the plan shall be as provided in said subsection (e) and in this section."

End